

**Tra-Mar Communications, Inc. and Lillian Ferraro and Dawn Baykal.** Cases 22-CA-10374 and 22-CA-10406

December 7, 1982

**DECISION AND ORDER**

BY MEMBERS FANNING, JENKINS, AND  
ZIMMERMAN

On April 23, 1982, Administrative Law Judge Thomas T. Trunkes issued the attached Decision in this proceeding. Thereafter, Respondent and the General Counsel filed exceptions and supporting briefs as well as briefs in partial support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,<sup>1</sup> and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The Administrative Law Judge found, *inter alia*,<sup>2</sup> and we agree, that discriminatee Dawn Baykal was a rank-and-file employee, and not a supervisor as alleged by Respondent, when she was discharged on November 6, 1980, and that her discharge on that date for protesting employees' working conditions violated Section 8(a)(1) of the Act.<sup>3</sup> We do not, however, agree with his finding that Lillian Ferraro's discharge did not violate Section 8(a)(3) and (1) of the Act.

The relevant facts leading up to Ferraro's discharge reveal the following: Sometime in April

1980,<sup>4</sup> Ferraro and employee Donna Lupo met with Respondent's president, Charles Sackermann, in an effort to secure raises for themselves and other employees. When informed by Sackermann that he could not afford to give them raises, Ferraro told him that the employees would then "have to take further steps." Ferraro thereafter discussed the need for union representation with other employees. After receiving assurances of support from a majority of Respondent's employees, Ferraro, accompanied by Lupo, met with union organizer Joe McLaughlin, who explained the procedures to be followed in organizing the employees and gave them authorization cards to distribute to other employees. The record reveals that Ferraro obtained signed authorization cards from at least three other employees. Having obtained authorization cards from a majority of Respondent's employees, the Union, in April, filed a petition for an election with the Board.

When Sackermann received notice of the petition, he summoned Ferraro and Lupo into his office and stated: "I understand you want a union at Tra-Mar. I want you to think twice before you make any moves because any privileges that you have now are definitely going to be taken away if the Union is voted [in]."<sup>5</sup> Ferraro responded by saying that Sackermann "would have to do what he has to do." Baykal credibly testified that sometime prior to the election held on May 30 Sackermann told her that he felt that "Ferraro was responsible" for bringing in the Union.

On June 2, just 3 days after the Union won the election, Respondent, in retaliation for the employees' having supported the Union, instituted certain unlawful written work rules prohibiting employees from smoking, making personal telephone calls, and receiving visitors on company premises, privileges which employees had enjoyed prior to the election. Additionally, during the months of June and July, Sackermann orally imposed other unlawful work rules prohibiting employees from reading and eating at the switchboard, using the pay telephones, and operating the air conditioner, and fur-

<sup>1</sup> Respondent and the General Counsel have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

<sup>2</sup> The Administrative Law Judge also found that Respondent had violated Sec. 8(a)(1) of the Act by promising its employees wage increases in order to dissuade them from supporting Local 827, International Brotherhood of Electrical Workers, AFL-CIO (hereinafter the Union), threatening not to grant said increases because of the employees' continued support for the Union, threatening them with discharge, layoffs, and plant closure because of their union and other protected concerted activities, and seeking to undermine the Union's authority by dealing directly with employees and granting them wage increases. He further found that Respondent had also violated Sec. 8(a)(3) and (1) of the Act by withdrawing certain employee privileges and imposing more stringent work rules in retaliation for the employees' having supported the Union and by issuing a written warning to discriminatee Lillian Ferraro because of her union activities. Respondent has not excepted to any of these findings.

<sup>3</sup> In agreeing with the Administrative Law Judge's finding that Baykal was a rank-and-file employee when she was unlawfully discharged, we find it unnecessary to rely on his alternative theory that, even if Baykal had been a supervisor, her discharge would still have been unlawful.

<sup>4</sup> All dates hereinafter are in 1980, unless otherwise indicated.

<sup>5</sup> The General Counsel has excepted to the Administrative Law Judge's failure to find that Sackermann's remark constituted a threat of more onerous working conditions and loss of privileges if the employees were to select the Union as their representative. We find merit to the General Counsel's contention and agree that Sackermann's remark violated Sec. 8(a)(1) of the Act.

We further agree with the General Counsel that Respondent also violated Sec. 8(a)(1) when, after the election, Sackermann said to employees: "I told you I'll never have a union in here, I'll never have a union telling me how to run my business or giving me orders as to what to do, before I do that I'll sell the business and move to Florida." Sackermann's remarks were clearly designed to discourage any further support for the Union by conveying the message to employees that their selection of the Union as their representative had been a futile gesture.

ther reduced the employees' lunch hour and removed the bottled water and coffee privileges. Finally, convinced that Ferraro was solely to blame for the Union's success at its establishment, Respondent, as found by the Administrative Law Judge, "lost no time in pinpointing Ferraro for further disciplinary action" and issued the unlawful warning to her on July 9, for her role as the Union's leading adherent. The record reveals that, when Ferraro sought to discuss with Sackermann matters relating to the unlawful warning, Sackermann told her that she had "wanted a Union in there, and things were going to get a hell of a lot worse before they got better."<sup>6</sup>

As a result of a disability unrelated to the instant proceeding, Ferraro was on a leave of absence from September 2 to October 14. Baykal and Lupo credibly testified that during her absence Sackermann questioned whether it was necessary for Ferraro to return to work "as everything seemed to be running smoothly" without her. Baykal and Lupo responded that they and other employees were anxious for Ferraro to return since they had taken on extra work as a result of her absence. Ferraro, whose testimony was corroborated by Lupo, testified that when she returned to work on October 14 Sackermann frequently stood directly behind her observing her as she worked, something he had not previously done with other employees.

During the evening of October 20, a dispute arose between midnight-shift operator Theresa Paul (Paul was Baykal's mother) and employee Linda Kappmeier over the latter's alleged mishandling of customer cards and billing records which had resulted in additional work for other employees. When Sackermann appeared for work the next morning, he began screaming at the employees that he did not want Kappmeier being bothered, that they were to keep their mouths shut, and that if they did not like it, they knew what they could do.<sup>7</sup> He further reminded them that he was the boss and that they must do what he said or they would be fired. When Baykal sought to get the matter resolved by meeting with the people involved, Sackermann informed her that she was not to give him any orders and, as of that date, relieved her of her supervisory authority for 1

month.<sup>8</sup> Baykal then stated that she could not understand why Sackermann was being so protective of Kappmeier and asked Sackermann if he was "sleeping with" Kappmeier. Sackermann replied in the affirmative.

Another incident arose on October 22, when Ferraro and Baykal questioned Kappmeier concerning statements she had allegedly made about Ferraro during her absence and about Baykal's mother, Theresa Paul. During that discussion, Baykal threatened to "punch [Kappmeier's] f—ing teeth out" if she did not stop creating problems. Shortly thereafter, Sackermann came out of his office and, after escorting Kappmeier to another office, began yelling at Ferraro, Baykal, and other employees present that they had been instructed to keep their "hands off" Kappmeier. One employee told Sackermann that Kappmeier was a troublemaker; Sackermann replied that there was no evidence of that. Ferraro then asked Sackermann why he was defending Kappmeier and further suggested that he ask Kappmeier why she had been let go from her previous jobs. Sackermann, however, responded by stating, "You should talk. You were fired and no matter where you work, you cause trouble. I spoke with your last boss on the phone. He told me how much trouble you caused." A shouting match thereafter ensued with Ferraro calling Sackermann "a f—ing liar" and demanding that he prove his claim that she had been fired and Sackermann yelling back that it was she who was lying.<sup>9</sup> In an effort to calm her down, Baykal and Lupo escorted Ferraro out the door.

Two days later, on Friday, October 24, Baykal was having a conversation with Sackermann over certain smoking privileges that had been accorded to the night shift, but not the day shift, when Ferraro, apparently still upset over Sackermann's earlier comment on her previous employment, asked Sackermann where he had received his information concerning her previous jobs. Ferraro stated that she believed that Kappmeier had told him. As Sackermann and Respondent's vice president, Ken Green, who was present during this conversation, began to leave, Ferraro informed Sackermann that he would be hearing from her attorney, that she was going to call the IRS, the FBI, and was also going to give "the Labor Board a call." When it appeared that Sackermann was ignoring her, Ferraro yelled out that Sackermann was "a f—ing coward."

<sup>6</sup> Sackermann's remark to Ferraro, following closely on the heels of the unlawful warning issued to her which, it should be noted, contained a threat of immediate discharge if she persisted in engaging in such conduct, constitutes in our view an implied threat of discharge for having supported the Union and thus violated Sec. 8(a)(1) of the Act. While Sackermann's remark was not alleged as a violation of the Act, Ferraro's claim that the remark was made stands undisputed and the matter has been fully litigated at the hearing.

<sup>7</sup> It appears that Kappmeier had phoned Sackermann at his home to inform him of the dispute.

<sup>8</sup> As noted, Baykal was unlawfully discharged just 2 weeks later for having protested the employees' working conditions.

<sup>9</sup> There is no evidence in the record to indicate if Sackermann's assertions concerning Ferraro's previous employment were true.

According to Sackermann, during the weekend that followed he decided to terminate Ferraro because of her use of abusive language towards him. On Monday, October 27, Sackermann handed Baykal a discharge letter to give to Ferraro.<sup>10</sup> While initially refusing to deliver the letter on the ground that Kappmeier, and not Ferraro, should be discharged, Baykal subsequently gave Ferraro the discharge letter and told her and other employees present that she was leaving. Thereafter, Baykal, Ferraro, Lupo, and another employee, O'Brien, went directly to the Board's offices where a charge was filed alleging Ferraro's discharge as unlawful.

In finding that Ferraro's discharge was not unlawful, the Administrative Law Judge noted that her discharge resulted not only from her use of profanity towards Sackermann but was also motivated, in part, by her union activities. Thus, he noted that Sackermann was obviously referring to Ferraro's union activities when, in his affidavit to the Board, Sackermann stated that in discharging Ferraro he took into account her "continued manner of behavior of getting involved . . . with things that did not concern her." Utilizing a *Wright Line* analysis,<sup>11</sup> the Administrative Law Judge found that "although Sackermann may have been looking for a reason to discharge Ferraro, but for her profanity she would still be employed." The Administrative Law Judge thus felt compelled to find, in light of the Board's decision in *Fibracon Corp.*, 259 NLRB 161 (1981),<sup>12</sup> where the discharge of an employee for using profanity towards a plant manager was found to be justified, that Ferraro's use of profanity towards Sackermann similarly justified her discharge.

In *Wright Line*, *supra*, the Board set forth the test that it would henceforth use in determining the validity of a discharge in "dual motivation" cases. Thus, it held that in such cases the General Counsel has the initial burden of showing that an employee's union or protected activity was "a motivating factor" in the employer's decision to terminate that employee. However, once the General Counsel has made such a *prima facie* showing, the burden then shifts to the employer to demonstrate that the employee would still have been discharged

even in the absence of the union or protected activity.

In the instant case we find that the General Counsel has made out a *prima facie* showing that Ferraro's discharge was motivated in part by her union activities. Thus, Sackermann's affidavit to the Board clearly indicates that in discharging Ferraro for her alleged use of profanity towards him Respondent also discharged her for "getting involved . . . with things that did not concern her." The Administrative Law Judge found, and we agree, that this latter statement was an obvious reference to Ferraro's union activities. Respondent, we note, has not excepted to this finding by the Administrative Law Judge. The General Counsel having therefore established that union activity was a motivating factor in Ferraro's termination, the burden shifted to Respondent to show that Ferraro would still have been discharged in the absence of her union activities. At this juncture, we must part company with the Administrative Law Judge for, contrary to his finding, we do not agree that Respondent has sustained its burden.

Rather, on the record before us, we are convinced that had Ferraro not engaged in any activities on behalf of the Union, she would not have been discharged for having used profanity towards Sackermann. The record in this regard clearly establishes that the use of profanity and other abusive language was a common occurrence among Respondent's employees and its management personnel. In fact, Baykal testified, without contradiction, that foul and vituperative language was used on a daily basis at the workplace. The frequency with which such language was used by both management and employees alike convinces us that foul and abusive language would, on occasion, have been directed by employees towards their superiors, and vice versa. Nevertheless, it is apparent that Respondent had been willing to tolerate such conduct in the past, for prior to Ferraro no employee had ever been disciplined or discharged for the use of such language.<sup>13</sup> Respondent, which at this

<sup>10</sup> The discharge letter stated that Ferraro was being immediately terminated from her present position "due to continuous insubordination and total lack of respect for management as evidence of [her] recent behavior." However, it is significant to note that Sackermann, in his affidavit to the Board, stated that, in addition to being discharged for her use of profanity towards him, Ferraro was also discharged for attempting to have Kappmeier fired and for her "continued manner of behavior of getting involved in [his] business with things that did not concern her."

<sup>11</sup> *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981).

<sup>12</sup> Member Jenkins dissented.

<sup>13</sup> Although the Administrative Law Judge found that on one occasion, Baykal, in Sackermann's presence, had stated that she was going to punch Sackermann's daughter, Nancy Taormina, "in the mouth," he nevertheless found the entire incident to be insignificant. However, contrary to the Administrative Law Judge's finding, the record establishes that Baykal's actual threat was to punch Taormina "in the f—ing face." Further, in finding the matter to be insignificant, the Administrative Law Judge ignored the fact that Taormina, as testified to by Sackermann, not only was one of Respondent's supervisors but also held the positions of vice president and treasurer of the company. Under these circumstances, we find that, contrary to the Administrative Law Judge, Baykal's use of profanity towards one of Respondent's chief officers and managerial employees, coupled with the threat of physical harm, was as serious an offense as Ferraro's use of profanity towards Sackermann. Aside from a mild rebuke by Sackermann, no disciplinary action was taken against

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point has the burden of showing that Ferraro's discharge for using profanity would have occurred in the absence of her union activities, has presented no evidence to indicate that such conduct had not previously been condoned. Under these circumstances, we find that it has failed to meet that burden.

The record, however, further reveals that while Respondent would have tolerated Ferraro's use of profanity towards Sackermann, it was unwilling to tolerate any support for the Union or Ferraro's activities on its behalf. Thus, it sought, through unlawful means, to thwart the Union's attempt to organize its employees and, having failed in that endeavor, it retaliated against its employees by unlawfully withdrawing certain privileges previously enjoyed by them and by imposing more onerous working conditions through the enactment of unlawful work rules. Further, believing that Ferraro was solely to blame for the success of the Union and because of her role as the Union's leading adherent, Respondent singled her out for disciplinary action and issued an unlawful warning to her which, it is significant to note, contained a threat of immediate discharge if she were to persist in the conduct described therein. That Respondent was anxious to get rid of Ferraro can hardly be disputed, for shortly after issuing the warning containing the threat of discharge it impliedly threatened her with discharge by telling her that things would be getting worse, rather than better, for her because of her desire to have a union, and further sought to prevent her from returning to work after her leave of absence. Additionally, upon her return to work, Respondent continued to harass Ferraro by watching her closely as she worked.

Thus, while Ferraro's use of profanity towards Sackermann may have been a factor in Respondent's decision to terminate her,<sup>14</sup> no evidence was presented by Respondent to support the claim that the discharge would still have occurred had Ferraro not engaged in union activities. To the contrary, we are convinced by the above-stated facts

Baykal for her conduct. That Baykal may have been a supervisor at the time this incident occurred does not, in our view, diminish the import of such conduct.

In other incidents involving the use of profanity, Sackermann referred to Ferraro as a "fat f---" and to employees who had written on phone equipment as "bastards."

<sup>14</sup> Indeed, it is questionable whether Ferraro's use of profanity towards Sackermann was even a factor in the decision to terminate her. In this regard we note that no disciplinary action was taken against Ferraro on October 22 when she first cursed at Sackermann. Rather, the decision to terminate her for that incident, as well as for the profanity used on October 24, occurred only after Ferraro had warned Sackermann that he would be hearing from her attorney and after threatening to go to the IRS, FBI, and the "Labor Board." Under these circumstances, Respondent's decision to terminate Ferraro may well have been motivated wholly by its belief that Ferraro would continue to engage in union or other concerted activity.

that had Ferraro not engaged in any union activities, Respondent, whose workplace was evidently not a showcase of virtue and who, indeed, provoked Ferraro's outburst, would have condoned Ferraro's misconduct. Having failed to meet its burden of rebutting the General Counsel's *prima facie* case as required under *Wright Line, supra*, Respondent, we find, has violated Section 8(a)(3) and (1) of the Act, as alleged.<sup>15</sup>

#### THE REMEDY

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act, we shall order that it cease and desist therefrom, and from in any like or related manner infringing upon its employees' Section 7 rights. Respondent shall also be required to offer employees Lillian Ferraro and Dawn Baykal immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed, and to make them whole for any loss of earnings they may have suffered due to the discrimination against them, with interest, in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977). See also *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

#### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Tra-Mar Communications, Inc., Union City, New Jersey, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with discharge, layoff, more onerous and arduous working conditions, loss of privileges, denial of wage increases, and with a shutdown of its business for engaging in protected concerted and union activities.

(b) Promising wage increases to its employees and creating the impression that the selection of the Union was a futile gesture in order to discourage them from engaging in union or other protected concerted activities.

(c) Bypassing Local 827, International Brotherhood of Electrical Workers, AFL-CIO, and bargaining directly with its employees.

<sup>15</sup> In view of our finding that Respondent would not have discharged Ferraro for using profanity towards Sackermann had she not engaged in union activities, we find the Board's decision in *Fibracorp, supra*, to be inapplicable herein.

(d) Discouraging membership in Local 827, International Brotherhood of Electrical Workers, AFL-CIO, or any other labor organization, by discriminating against employees in regard to hire or tenure, of employment, including withdrawal of privileges, issuance of written or verbal work rules, and issuance of warning letters to its employees.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer Lillian Ferraro and Dawn Baykal immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of pay they may have suffered by reason of their discriminatory discharges, in the manner set forth in "The Remedy" section of this Decision.

(b) Expunge from its files any references to the discharges of the above-named employees and notify them in writing that this has been done and that evidence of this unlawful conduct will not be used as a basis for future personnel action against them.

(c) Reinstatement all privileges previously enjoyed by its employees which had been withdrawn because they engaged in protected concerted and union activities.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its place of business in Union City, New Jersey, copies of the attached notice marked "Appendix."<sup>16</sup> Copies of said notice, on forms provided by the Regional Director for Region 22, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

<sup>16</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(f) Notify the Regional Director for Region 22, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

MEMBER JENKINS, concurring:

This case illustrates the confusing and misleading effect caused by an effort to apply *Wright Line* to situations where it has no applicability: cases in which there is only one genuine motive, and that one unlawful, for a discharge.

All (except Respondent) agree that Ferraro's union activity was a cause of her discharge. Respondent asserts her use of profanity was the regular order of the day, without ever having caused a discharge. Thus it is plain that the profanity was a pretext, and there is no need to spend barrels of ink logging the route.

*Wright Line* misled an Administrative Law Judge here, not for the first or last time. We should limit that case to the situation it was designed to meet: two existing motives for the discharge, one lawful and one unlawful.

## APPENDIX

### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT threaten employees with discharge, layoff, more onerous or arduous working conditions, loss of privileges, denials of wage increases, or with close of our business for engaging in union or protected concerted activities.

WE WILL NOT promise our employees wage increases or create the impression that their selection of the Union was a futile gesture in order to discourage them from supporting the Union or engaging in other protected concerted activities.

WE WILL NOT bypass Local 827, International Brotherhood of Electrical Workers, AFL-CIO, and deal directly with our employees on matters concerning wages, hours, and working conditions.

WE WILL NOT withdraw privileges previously enjoyed by our employees for engaging in protected concerted or union activities.

WE WILL NOT issue written or verbal work rules to our employees for engaging in protected concerted or union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Lillian Ferraro and Dawn Baykal immediate and full reinstatement to their former jobs or, if their jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges, and WE WILL make them whole for any loss of pay, with interest, suffered by them by reason of our discrimination against them.

WE WILL expunge from our files any reference to the discharges of Lillian Ferraro and Dawn Baykal and shall notify them in writing that this has been done and that evidence of this unlawful conduct will not be used as a basis for future personnel actions against them.

WE WILL reinstate all privileges previously enjoyed by our employees which had been withdrawn because they engaged in protected concerted and union activities.

#### TRA-MAR COMMUNICATIONS, INC.

#### DECISION

##### STATEMENT OF THE CASE

THOMAS T. TRUNKES, Administrative Law Judge: The above proceeding was heard in Newark, New Jersey, on July 20-23 and 27-29, 1981, upon charges filed on October 27, 1980, by Lillian Ferraro, herein Ferraro, in Case 22-CA-10374, and on November 7, 1980, by Dawn Baykal, herein Baykal, in Case 22-CA-10406, and complaints issued thereon respectively on December 11 and December 22, 1980,<sup>1</sup> pursuant to Section 10(b) of the National Labor Relations Act, as amended, herein called the Act, which alleges that Tra-Mar Communications, Inc., herein Respondent, violated Section 8(a)(3) and (1) of the Act by discharging and refusing to reinstate Ferraro and Baykal. In addition, both complaints contain several allegations of independent violations of Section 8(a)(1), including an allegation of bypassing the collective-bargaining representative of Respondent's employees and dealing directly with employees regarding wages, hours, and working conditions.<sup>2</sup>

All parties were represented at and participated in the hearing, and had full opportunity to adduce evidence, ex-

amine and cross-examine witnesses, file briefs, and argue orally.<sup>3</sup> The issues presented in this case are as follows:

1. Whether Respondent violated Section 8(a)(1) of the Act by committing any of the specific independent violations as alleged in the complaints.

2. Whether Respondent violated Section 8(a)(3) and (1) of the Act by withdrawing privileges and imposing more onerous and arduous terms and conditions of employment by announcing and implementing various written and verbal work rules in June and July 1980.

3. Whether Respondent violated Section 8(a)(3) and (1) of the Act by issuing a warning letter to, and/or thereafter discharging, Ferraro.

4. Whether Baykal was a supervisor as defined in Section 2(11) of the Act between October 20 and November 6, 1980.<sup>4</sup>

5. Whether Respondent discharged and failed to reinstate Baykal in violation of Section 8(a)(3) and/or (1) of the Act.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by Respondent and the General Counsel, I make the following:

#### FINDINGS OF FACT

##### I. JURISDICTION

Respondent, a New Jersey corporation, with its principal office and place of business located in Union City, New Jersey, is engaged in the business of providing radio paging and mobile radio telephone services and related communication services. During the preceding 12 months, which operations are representative of its annual operations at all times material herein, Respondent derived gross revenue in excess of \$100,000. During this same period Respondent caused to be purchased, transferred, and delivered to its place of business, goods and materials valued in excess of \$50,000, of which goods and materials valued in excess of \$50,000 were transported to its place of business in interstate commerce directly from States of the United States other than the State of New Jersey. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

##### II. THE LABOR ORGANIZATION

Respondent admits, and I find, that Local 827, International Brotherhood of Electrical Workers, AFL-CIO, herein called the Union, is and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

<sup>1</sup> By Order dated January 14, 1981, the two cases were consolidated for a hearing.

<sup>2</sup> No allegation of a violation of Sec. 8(a)(5) is contained in either of the two complaints.

<sup>3</sup> All parties waived oral argument. Only the General Counsel and Respondent filed briefs.

<sup>4</sup> Unless otherwise noted, all dates hereafter refer to the year 1980.

## III. THE ALLEGED UNFAIR LABOR PRACTICES

## A. Background

## 1. Operation of Respondent

Respondent is licensed by the Federal Communications Commission and is known as a radio common carrier. It is authorized to utilize radio channels for radio paging and for car telephone service. Certain clientele of Respondent have telephones in their vehicles which Respondent services. Other clients have beepers attached to their belts which emit a signal when the party is being called by telephone. The officers of Respondent are the following: Charles Sackermann, herein Sackermann, president; Nancy Taormina (nee Sackermann), herein Nancy, vice president and treasurer; Vernice Sackermann, herein Vernice, vice president and secretary; Kenneth Green, herein Green, vice president. All of the four officers are on the board of directors. Respondent is a private corporation, all the shares of stock are owned by Charles Sackermann. Nancy and Vernice work in the bookkeeping department. In addition to the four officers, Baykal was the only other supervisor until at least October 20. Baykal, Nancy, and Vernice were paid salaries, whereas the other employees were paid hourly. As a supervisor, Baykal's duties included setting up schedules, making substitutions for absent employees, checking timecards, checking entries of clients who used the radio channel, and responsibly directing other employees. In addition, Sackermann testified that he empowered Baykal to hire and discharge employees, which she exercised in June in discharging an employee without consultation with him.

Between April and November 1980 there were approximately 12 other employees on the payroll of Respondent working as mobile and paging operators.<sup>5</sup> Respondent operated a 24-hour schedule. On the dayshift, from 8 a.m. to 4:30 p.m., were Ferraro, Maureen O'Brien, herein O'Brien, and Donna Lupo, herein Lupo. These were full-time mobile operators. The evening shift, from 4:30 p.m. to midnight, was operated by several part-time employees, including Linda Kappmeier, herein Kappmeier, Lorraine Locantore, herein Locantore, Nannette Lupo, Eileen Paul, Coreen Paul, and Doreen Blaettler, herein Blaettler. The midnight to 8 p.m. shift was operated by Laura Romano and Terry Paul, herein Terry, who is the mother of Baykal.<sup>6</sup>

## 2. Union activity of Respondent's employees

Ferraro testified that in April she and Lupo met Sackermann in his office for the purpose of requesting a raise for the employees. When Sackermann stated that he could not afford to give a raise, he was told by Ferraro that the employees would have to take further steps.<sup>7</sup>

<sup>5</sup> These positions are akin to telephone operators at a switchboard for the telephone company.

<sup>6</sup> Another employee on the payroll working part time was Richard Steffens. The record does not reveal the hours he worked or what job title he held.

<sup>7</sup> Ferraro testified that either she or Lupo made the statement. Lupo testified that Ferraro made that statement.

Following the meeting with Sackermann, Ferraro met with other employees and asked if they were willing to entertain union representation. Upon receiving assurances from the majority of the employees, she contacted Woody Page, a business agent for the Union, who put her in contract with Joe McLaughlin, a union organizer. At a meeting held in April with Lupo and Ferraro, McLaughlin explained benefits of union membership and procedures that would follow and handed them union-authorization cards to be distributed and signed by the employees of Respondent. Ferraro thereafter solicited other employees, including O'Brien, Eileen Paul, and Locantore. Subsequently, another meeting was held with McLaughlin, other union organizers, and several employees of Respondent, including Ferraro. Ferraro returned to McLaughlin several signed union authorization cards, after which he explained that he would file a petition with the Board, and that an election would be held. Sackermann conceded that he received a communication from the NLRB, indicating that a petition was filed by the Union in April. Thereafter, an election was held on May 30 at Respondent's place of business. The tally of ballots indicated that of approximately nine eligible voters, eight cast ballots for the Union, and no one cast ballots against it. Although Respondent filed timely objections to the election, they were later withdrawn, and the Union was certified on June 19.

## B. Alleged Independent 8(a)(1) Activity

Ferraro testified extensively with respect to union animus and alleged independent 8(a)(1) activity of Respondent. Ferraro stated that upon receiving notification by the Board of the representation petition filed by the Union, Sackermann requested that Ferraro and Lupo come to his office. When they arrived at his office, according to Ferraro, Sackermann was holding a letter in his hand and stated, "I understand you want a union at Tra-Mar. I want you to think twice before you make any moves because any privileges that you have now are definitely going to be taken away if the Union is voted." Ferraro answered that he "would have to do what he has to do." She further testified that following this initial meeting with Sackermann, and prior to the election, Ferraro attended numerous meetings called by Sackermann in his office and in the dispatch room. Basically Sackermann repeated to Ferraro and other employees what he had stated in the first meeting with her and Lupo. She further declared that in mid-May, Sackermann invited Lupo and herself into his office and discussed the possibility of increases in salaries and benefits. When the two employees expressed interest, he stated that he would discuss further possibilities of raises and benefits through Baykal. Later, Baykal informed Ferraro, Lupo, and O'Brien in a meeting in the dispatch room that Sackermann was offering them a 25-cent-an-hour raise and another 25-cent raise in January 1981 if the Union were not elected.<sup>8</sup>

<sup>8</sup> As stated, *supra*, the Union was successful in the election held on May 30.

The following Monday, June 2, Sackermann announced in the presence of Baykal, Lupo, O'Brien, and Ferraro, "I told you I'll never have a union in here. I'll never have a union in here telling me how to run my business, or giving me orders as what to do. Before I do that, I'll sell the business and move to Florida." On cross-examination, Ferraro further testified that at a meeting in her house sometime in May, prior to the election, attended by Lupo, O'Brien, Locantore, Terry, and Ferraro, Baykal, who had requested the meeting with the employees for the purpose of relaying what Sackermann had told her with respect to salary increases and other benefits, stated, "Mr. Sackermann would like to speak to you girls through me, as far as the increases in salary and benefits."<sup>9</sup>

Baykal testified that, after the Union commenced its organizational campaign, Sackermann informed Baykal that employees were attempting to acquire a union, and that he "felt Ferraro was responsible." Baykal testified that he asked, "Did the girls realize what they were doing, did they have any idea of what they were—they were doing and what this was going to do to him?" Baykal further testified that Sackermann told her that, "He wasn't going to have any union come in there and tell him how to run his company, that he would sell the company first or he would automate." Baykal further stated that in another instance Sackermann called her into his office and discussed the possibility of speaking with the girls regarding increases in wages and other benefits. Sackermann instructed Baykal to work with the bookkeeper (his daughter Nancy) to "work up figures in benefits that would be agreeable." Baykal stated that she and Nancy agreed that, "the girls would get a 25-cent raise immediately. There would also be other raises, the next one being January 1981, and possibly raises after that at set times. Also, benefits were agreed upon, additional sick days." Baykal then stated that these raises and benefits were offered by her to Lupo, O'Brien, Ferraro, Locantore, Kappmeier, and practically every operator over a period of time up to the day of the election. She stated that she informed them that Sackermann was willing to give them what they wanted, adding that, "he did not want the Union in there and that if we could agree upon this, the girls would vote no for the union, not to vote the union into the company." Baykal also testified that sometime before the election in May, Sackermann announced to the day-shift operators (Ferraro, Lupo, and O'Brien) in the dispatch room that he would sell his business or automate before dealing with the Union. Baykal also testified that following the election Sackermann informed her that he would not commit himself to the raises promised for January 1981. He stated to her that this was a misunderstanding. She responded that she had informed the employees of the raises. He advised that she inform the employees otherwise. She thereafter notified Lupo that Sackermann related that he could not commit himself to the January 1981 raise at that moment.

Lupo testified that, at the meeting in April in Sackermann's office with Ferraro present, Sackermann told the two employees that he was aware of the election, and

warned that he could possibly move to Florida and sell his business, or he could computerize his system, which would eliminate the position of operator. She further confirmed that Baykal had told her that Sackermann was willing to grant raises, more sick pay, holiday pay, and vacations for part-time employees. However, she did not testify that these promises of benefits were conditioned on the employees not voting for the Union.

O'Brien, who has since voluntarily terminated her employment in June 1981, testified that sometime before the election she had a conversation with Sackermann in his office. She stated, "Well, I don't remember everything he said, but, some of the things he said were Tra-Mar is a small company and it really didn't need a union. And, a union wouldn't do that much good for me, and other people were trying to influence me, and that he had it all worked out in the budget to give us raises every few months. And, that now it was frozen because of the union and he couldn't give it to us." O'Brien further testified that Baykal had promised her that, if the employees voted against the Union, they would get a raise.

Respondent presented two witnesses to respond to the alleged 8(a)(1) independent violations.

Sackermann testified as follows: At a meeting in April with Lupo and Ferraro regarding a request for raises, he informed them that he could not grant their request because he had serious financial problems at that time. Sometime later, following the filing of the union petition, in another conversation with Lupo and Ferraro in his office, he suggested that they think before they act. He also acknowledged that he had financial problems, and asked that they do nothing that could hurt him. He recalled having conversations with other employees, including Baykal, O'Brien, Terry, Locantore, and Kappmeier, similar to the one he had with Lupo and Ferraro in his office. He further testified that he had engaged in various conversations with Baykal, in which he explained that he was concerned that, if the Union were successful, he would not be in a position to meet their monetary demands. He also spoke to Baykal approximately 2 weeks prior to the election about possible raises, informing her that Respondent could afford at that time a 25-cent-an-hour raise, and instructing her to communicate this information to other employees. He then testified that he was uncertain that the raise was effectuated, as Baykal and Nancy handled the details thereafter. On cross-examination by the Charging Party, Sackermann stated that Respondent was having financial problems and that he had told employees, "Think before you hurt me." He explained that the Union could hurt him as follows: "If the Union came in the demands that they could demand on to the Company could be on what my cash flow is and I would have a problem paying bills and I would have been—financial problems." He further stated on cross-examination that, after he delegated Baykal and Nancy to work out the raises for new employees, he was informed that the employees wanted a guarantee, in writing, of a 25-cent raise in January 1981. He testified, "I couldn't guarantee it. I said I would try. If I could give more, I would give more. I

<sup>9</sup> The record is void of any further testimony by Ferraro on this point.



will not guarantee it, because I had no idea what the position would be in January. That's what I said."

Nancy, treasurer and bookkeeper of Respondent, testified as follows: One of the part-time employees working the 4:30 p.m. to midnight shift, Blaettler, was earning the minimum wage of \$3.10 an hour in November. Nancy increased her salary to \$3.25 because Respondent had hired a new employee to start at the minimum wage, and Nancy believed that it would not be fair to Blaettler to be receiving the same wages as the new employee. She testified that this was the normal procedure when a new employee was hired. Blaettler's wages increased to \$3.35 in January 1981 and again to \$3.60 later that month because the minimum wage was increased 25 cents at that time. Nancy testified that between September and November 1980 Blaettler was the only employee who received an increase in wages. However, she did testify that wages of other employees, such as O'Brien, were augmented as the minimum wage increased.

### C. Changes in Work Rules

Following the election of Friday, May 30, the full-time daytime operators returned to work on Monday, June 2. Sackermann, addressing Lupo, O'Brien, and Ferraro, notified them that he wanted an efficiently run company. He then presented each employee with a memorandum which read as follows:

June 1, 1980

#### MEMO TO ALL SWITCHBOARD EMPLOYEES

I would like to take this opportunity to thank all of you for your services.

The following is a list of regulations that have been compiled to help this company run more efficiently:

- \*1. No smoking for your health and for the health of others.
- \*2. No personal phone calls, incoming or outgoing.
- \*3. Absolutely [sic] No Visitors allowed.
- \*4. There will be No tampering [sic] with any Employee Time Cards. This will lead to the dismissal of both parties [sic] involved.

**\*IF ANY OF THESE REGULATIONS ARE NOT COMPLIED WITH, IT WILL LEAD TO YOUR IMMEDIATE DISMISSAL.**

THANK YOU,

/s/ Mr. Charles E. Sackermann

Ferraro testified that prior to the election the employees were permitted to smoke, receive personal telephone calls, make personal telephone calls, and receive visitors on the premises, but were not allowed to tamper with the timecards. Ferraro further testified that in June she had contacted OSHA<sup>10</sup> to complain about dangerous

working conditions, which included a need for repair of the front steps of the building, a lack of a fire escape in the two-story building, and a large hole in the floor of the dispatch room. A few days later, an OSHA inspector informed Ferraro that Sackermann agreed to make the necessary repairs, and advised her that should there be any repercussions, she should contact him.

Further work rule changes were introduced at Respondent's premises in June and July. According to Ferraro, the luncheon period was reduced from 1 hour to one-half hour; reading and eating were prohibited at the board; standing in the dispatch room on breaktime, using the pay telephone, and writing on telephone equipment, all were disallowed; the employees were deprived of coffee and bottled water previously allotted to them; and no one was permitted to put on the air conditioner except Baykal or Sackermann. Ferraro testified that these rules were verbally promulgated by Sackermann to Baykal each time Sackermann observed something he did not like.

Ferraro further testified that with respect to the rule prohibiting eating at the switchboard, many employees, including herself, ate at the switchboard in the presence of Sackermann many times before June 2, without complaint from him. She explained that after Sackermann observed her reading a newspaper on her break at the switchboard one day, he screamed at Baykal that he did not want any reading at the board. With respect to the air conditioning, Ferraro stated that, until the rule change, it was she who put on the air conditioner every morning in the summer. As for the use of the telephone, Ferraro asserted that after Sackermann had observed Lupo and her using the pay telephone located across the street at Tra-Mar Electronics, also owned by Sackermann, he directed that they discontinue the use of the telephone. With respect to standing in the dispatch office during breaks, Ferraro averred that after Sackermann had noticed her standing in the dispatch room during a break, he screamed at Baykal that he did not want anyone in the dispatch room while on her break.

Ferraro further testified that sometime in June or July, Baykal protested the issuance of verbal rules to Sackermann. Baykal requested that he post all his rules and regulations that he wanted enforced because the employees did not know they were breaking rules if they were not aware of them. This protestation was made in the dispatch room in the presence of Ferraro, Lupo, and O'Brien. Ferraro testified that she did not hear any response from Sackermann.

On cross-examination, Ferraro acknowledged that in 1976 a written set of rules had been promulgated and signed by Baykal, via a memorandum directed to all operators. The memorandum states the following:

#### ATTENTION: OPERATORS

#### PLEASE COMPLY TO THE FOLLOWING RULES EFFECTIVE NOVEMBER 22, 1976

1. Payday is Wednesday at 4:00 P.M.
2. All are required to punch in and out.

<sup>10</sup> Occupational Safety and Health Administration, an agency of the U.S. Department of Labor.

3. Operators in the day are to punch in and out at lunch time, starting November 22, 1976.
4. When an operator is working a channel she is to concentrate on her mobile phones, while the two back up girls handle the Tra-Mar and paging phones. If the two back up girls are both busy and the operators working the channels are free, they too are to pick up a page phone.
5. Don't get up from the board to use ladies' room or to get coffee etc. without asking another girl to cover your station.
6. Reference absenteeism: you are to call your supervisor at her home—865-6126—if she is not there, then call into the office, but not at the last minute. If you are going to be ill, you know 15 min. before it's time to report to work.
7. During the day there should be no reading material at the board. Also, any selling (Avon, Tupper Ware, etc.) is to be done during lunch time or before punching in or after punching out.
8. All operators are to clean up after themselves. Please don't write on the desks or phone equipment. When you are the one to get ink on your clothing you will realize what I'm trying to say.
9. Any questions regarding your pay should be asked of your supervisor, she will then get your time card and go over it, with you.

I hope that this memo is clear. Any questions that you might have, I will be more than happy to discuss with you.

Let us all buckle down to start the New Year right.

Thank you,  
/s/ Dawn P. Baykal  
Supervisor

Tra-Mar Communications, Inc.

Ferraro asserted that with respect to rule 7 (reading at the switchboard), Sackermann had seen her reading at the board many times after the 1976 memorandum. However, she did acknowledge that the rules involving writing on telephone equipment and punching timecards were never revoked, and, thus, were still in effect.

Ferraro acknowledged a memorandum of January 1, 1980, issued by Baykal with reference to visitors, which reads as follows:

January 1, 1980

Please Note: This is just to show you, how many times the same rules have been repeated.

There are a few facts that have been changed:

1. Friday is now Payday, after 3 o'clock.
2. Another change is my telephone number, it is now 865-4957.

New rule and most important, there are to be no visitors coming up to the dispatch room, day or night. That means customers, or friends. Also, there is no reason to come to the office if you are not scheduled to work, this is not a hang-out, it is a place of business!

PLEASE Adjust your minds to follow the Company guidelines.

A Happy & Peaceful New Year to All.

Thank you,

/s/ Dawn P. Baykal  
Supervisor

Tra-Mar Communications, Inc.

Ferraro claimed that although this rule was promulgated by Baykal, it never was enforced as visitors continued to visit the premises of Respondent.

On cross-examination, Ferraro agreed that the rule changes instituted by Respondent were not instituted specifically against her only, but were instituted for all employees. With respect to the termination of coffee privileges, Ferraro acknowledged that Sackermann had paid for the coffee.

Ferraro further testified that she was unaware of any violations OSHA issued in regard to smoking. The no-smoking rule issued on June 2 occurred before the OSHA inspection and before her complaint to OSHA. She further testified that the water cooler had been removed in June and was not replaced—at least not until the date of her discharge in October.

Baykal, in support of Ferraro, testified that prior to the election she had issued work rules which were not enforced. However, after the election Sackermann issued a new set of rules on June 2, and thereafter issued verbal rules with respect to anything that annoyed him.

Coreen Paul, sister of Baykal, employed part time as a mobile operator on the 4:30 p.m. to midnight shift, testified that subsequent to the issuance of the work rules of June 2, these rules were not enforced on her shift with respect to smoking and visitors. She testified that she had observed Kappmeier and Locantore smoking on the evening shift and had further observed Locantore receiving visitors on several different occasions. Specifically, she recalled Blaettler visiting Locantore and both were crocheting and exchanging recipes in the presence of Sackermann. He did not object that Locantore was receiving visitors or that she was breaking any of his rules. On another occasion in September when she visited the office on a weekend shift one night, she observed Kappmeier at the switchboard smoking in the presence of Sackermann. On cross-examination, she testified that the smoking rule was enforced against her until the day she saw Kappmeier smoking. She also asserted that recently Lupo was sitting with her at the switchboard while she was working in the presence of Sackermann, for which she was not disciplined.

Lupo testified that employees had punched each other's timecards in the presence of Sackermann prior to June 2 without complaints from him. In addition to the rules as testified to by Ferraro, Lupo stated that employees of Tra-Mar were not permitted to speak to employees of Tra-Mar Electronics or talk to the floormen. Also they were obliged to use placemats under coffee cups at their desks. She further asserted that Baykal, Ferraro, and O'Brien all smoked during the day shift, and that Sackermann informed the employees that he "did not want more than one girl smoking at a time."

Terry Paul testified that she eats at the switchboard during her shift, and had observed Kappmeier smoking and eating at the switchboard. On cross-examination, she acknowledged that subsequent to June 2 Sackermann set up a special table in the hallway with an ashtray where employees could go to smoke.

Sackermann testified, with respect to the written rules of June 2, that he was afraid of a citation by OSHA charging his premises to be a firetrap, which caused him to promulgate the no-smoking rule. Sackermann asserted that the other rules of June 2 with respect to visitors and telephone calls were not enforced either before or after June 2. With respect to oral rules issued in June and July, Sackermann acknowledged issuing rules with respect to the withdrawal of the coffee and the water cooler, the use of the air-conditioning system, and markings on panels and wiring. However, no explanation was forthcoming to explain the lack or nonconnection between the issuance of rules and the fact that the Union was successful in the election of June 2.

#### *D. Warning Letter to Ferraro On July 9*

On July 9, Sackermann handed Ferraro and Baykal copies of a letter addressed to Ferraro which reads as follows:

Lillian Ferraro:

July 9, 1980

Please be advised that this shall constitute a warning letter to advise you that for the past six (6) weeks your attitude towards management has been one of gross insubordination as evidence by your following acts: 1. Approximately six (6) weeks ago you demanded my presents [sic] before all the other workers to advise me that you were unhappy about the fact that the Bookkeeping Department and the workers from Tra-Mar Electronics all went out to lunch at the same time. This is absolutely no concern of yours and should not have been a matter for discussion. 2. It has been felt by management that you have not worked for the best interests of this company and it is our distinct impression that you have spoken to individuals such as Telephone Company employees and others while on the premises in an attempt to discredit the management of this Company, via the telephone equipment. 3. You have taken to eating your lunch on my desk as an act of defiance [sic] and for the most part you have completely disregarded [sic] all company rules.

Please be advised that this shall be your only warning letter and if your behavior in this manner continues in the future you will be summarily discharged.

/s/ Charles E. Sackermann  
President

CES:vs

cc: Vincent Verdiramo  
Dawn Baykal

Ferraro testified that Sackermann requested Baykal to sign her copy of the letter as proof that Ferraro had received it. Baykal at first refused to do so, contending that the contents of the letter were not true. Sackermann, according to Ferraro, screamed at Baykal, "I don't care if you think it is true or not, just sign it so that I know that I have proof that Lillian received the letter." Baykal thereafter did as directed.

In response to the accusations presented in the letter, Ferraro testified that she never demanded the presence of Sackermann in front of her fellow employees. She stated that she asked Sackermann if she could speak to him for a moment, inquiring why the bookkeeping department and Tra-Mar Electronics' employees went to lunch together as it created a heavier workload on the mobile operators. Sackermann responded by screaming at Ferraro that the bookkeeping department and Tra-Mar Electronics employees can go to lunch and stay as long as they like, and it was none of Ferraro's business. According to Ferraro, he also charged that she "wanted a Union in there, and things were going to get a hell of a lot worse before they got better."

As for the second allegation in the letter, Ferraro denied speaking to anyone in an attempt to discredit Respondent. She does acknowledge having spoken to a telephone repairman, thanking him when he congratulated her for the success of the Union. This incident took place in the latter part of June in the dispatch office in the presence of Lupo, O'Brien, Baykal, and Nancy. She recalls Nancy calling Sackermann on the intercom system, after which he came to the dispatch room, and invited the telephone repairman to accompany him into his office. She averred that she heard loud arguing emanating from the office, but did not hear the contents of the conversation.

With respect to the third allegation in the letter, Ferraro denied ever eating lunch at Sackermann's desk.

Baykal confirmed Ferraro's testimony with respect to her participation in the letter incident. She testified that Ferraro did not break any company rules up to that point or thereafter.

Sackermann defended the issuance of the letter as follows:

1. He disputes Ferraro's account of the discussion involving the luncheon matter of the bookkeeping department and the Tra-Mar Electronics employees. He asserted that in a loud voice in front of other employees, she demanded to know why this was done, and as he described it, "It was in a loud tone of voice and it was though she was the boss and I was working for her."

2. Sackermann had some problems with realigning the telephone wires after part of the office was moved. He became involved in a dispute with the telephone repairman, Bill Matys, who informed Sackermann that he was a union man and did not want Sackermann to touch any of the wires of the building. An accommodation was made with the telephone repairman by Sackermann. That afternoon he walked into the dispatch room and observed Ferraro talking to the telephone repairman. He heard her telling him which extensions worked properly, which were not, which bells were working, and which

lights were not working. As he stated in his testimony, "I felt that Lillian Ferraro was butting into things that she shouldn't have."

3. Having moved the dispatch office from the second story to the ground floor of the building, Sackermann provided the room with carpeting, drapes, and new desks. He also provided a break room where the operators could sit and eat as he did not want any eating to be done at the dispatch board. He told the employees that he did not want cups put on the dispatch board without placing something under them. One day he alleged that he walked by and saw Ferraro sitting at the board with coffee and a newspaper. This occurred after he had issued his verbal instructions not to eat or read at the switchboard. He explained that, although Ferraro never ate lunch at his personal desk, he considers all the desks in Respondent's premises belonging to him and therefore the item referred to: "Eating your lunch on my desk," referred to the desk supplied to Ferraro, not to his personal desk in his office.

*E. Events of October 20, Including the Alleged Nonsupervisory Status of Baykal*

It should be noted that between the events of July until October 20, no alleged violations relating to Ferraro or Baykal occurred. The record establishes that Ferraro was absent from work from September 2 to October 14 as a result of a disability unrelated to the instant case.

Ferraro testified that on Monday, October 20, when she reported to work to relieve Terry, the weekend night operator, she observed that Terry was very upset, stating that she had problems with Kappmeier. Terry telephoned Kappmeier and engaged in an argument with her. According to Ferraro, a short time later Sackermann came to work, appearing extremely angry. He screamed at the employees present, which included Lupo, O'Brien, Baykal, Vernice, and Ferraro, that he did not want Kappmeier bothered, especially at home. He wanted the employees to keep their "mouths shut" and if they did not like it they "knew what they could do. I'm the boss here. You listen to me. If not, you all will be fired." Baykal answered that she would like to straighten out the matter and have a meeting with the people involved. Sackermann retorted, "Don't give me orders. You cannot make any decisions for one month. Any decisions you have to make, you come and ask me first." Baykal responded that she did not know why Sackermann was being so protective of Kappmeier, as she just wanted to do her job to straighten the matter out. According to Ferraro, Sackermann fired back, "Because I am sleeping with her." He also stated to Baykal, "I want you keep your mouth shut and your ears closed to what's going on around here." Ferraro later testified that she recalls Sackermann stating, "Dawn, I don't want you to make any decisions in here unless you check with me on every detail first."

Ferraro testified that no written notification was sent to the employees to indicate that Baykal was no longer a supervisor. The basis for Ferraro's testimony that Baykal no longer was a supervisor related to Sackermann's statement in her presence on October 20. She asserted further that, when Baykal was a supervisor, she relieved the

mobile operators at the switchboard every day during lunch hour, and, in addition, she also operated the switchboard when an employee scheduled to work was absent.

According to Baykal, both O'Brien and Terry were having work problems with Kappmeier. She essentially verified Ferraro's detailed account of the events of the morning of October 20. She added that Sackermann instructed her not to ask anybody any questions, told her that she was on probation, and that "every move she made or anything that came up, she was not to do anything on her own but check with him no matter how big or how small the detail was, and if she did not like it she knew what she could do." He further suggested that she would not be happy until Kappmeier was fired. Baykal responded that she wanted to straighten out the problem and had no intention of firing Kappmeier.

On cross-examination, Baykal insisted that she formed the opinion that she no longer was a supervisor on October 20, based on what Sackermann had told her that day. However, she acknowledged that in a hearing on December 12, before the State Unemployment Division of New Jersey, she had testified that she was not aware that she was just an operator until Sackermann informed her of that on November 6, the date of her discharge.

Baykal further acknowledged that she never punched a timeclock either before October 20 or after, unlike all the other employees. Further, after being relieved of her supervisory functions, until her discharge on November 6, she was not replaced. She contended that from October 20 until her discharge on November 6, she did not perform any of the supervisory duties to meet the criteria as defined in Section 2(11) of the Act. She specifically stated that after October 20, she no longer had the ability to make decisions. She was not permitted to discharge anyone nor permitted to question employees working under her. In addition, she no longer fashioned the work scheduled for employees. She was functioning as a mobile operator; operating the switchboard and answering telephones, not supervising anyone at that time. However, she acknowledged that during this time frame her salary was not reduced.

On cross-examination, Baykal acknowledged that from October 20 to November 6, as she had performed in the past, she continued to record customer cancellations or changes in a record book maintained by Respondent. Furthermore, she continued to pick up timecards, initial them, and record times worked by employees, the same as previously performed by her prior to October 20. Baykal further testified that prior to October 20 an employee absent for illness would notify her and she, in turn, would assign another employee as a replacement. Baykal testified from October 20 to the date of her discharge she did not believe that she substituted one employee for another. However, she does recall placing a call to Blaettler to work as a substitute during this period. However, when Blaettler informed her that she could not do so, she notified Sackermann of the problem, who thereafter telephoned Blaettler himself.

Baykal further testified that on October 24, Sackermann called her into his office in the presence of Ken

Green. He informed her that he wanted the business to run smoothly and wanted "all the nonsense stopped." Baykal responded that by not permitting her to speak with Kappmeier and clearing the air immediately, Sackermann made the problem bigger. He reminded her that she was on probation, that the troublemaker would be found, and the next one to step out of line would be fired. She also testified that on November 5, in the presence of Lupo, Baykal informed Sackermann that certain cards were being filed incorrectly, and she was going to question the employees. He reminded her that she was on probation and she had no right telling him that she was going to question the "girls" about it. According to Baykal, Sackermann added that he would handle the problem, and if she did not like it she knew what she could do.

Lupo confirmed the events of October 20 in essential detail. She testified that Sackermann came into the dispatch office "yelling and screaming." He said that he wanted the nonsense stopped and that Kappmeier was not the cause of his problems and that others were causing trouble. Ferraro responded, "How can seven out of eleven girls be wrong? You shouldn't be sticking up for Linda." Sackermann responded, "This was his company, he's the boss, and he says what's right and wrong." He added that the next one who steps out of line would be fired immediately. He then turned to Baykal and told her, "I don't want you making any decisions for a whole month. Come to me with everything. Even minor things." According to Lupo, Sackermann further announced that all the girls were on probation without any further explanation.

Vernice testified with respect to the October 20 incident as follows: On October 20 as she was riding to work with her father, he told her he had a problem at work and wanted her to be a witness. When they arrived he began to discuss the problem with Baykal in the dispatch room in the presence of Ferraro and Lupo. According to Vernice, Respondent had encountered a problem with cards being improperly filed. Baykal stated that Kappmeier had not filed the cards away, that she was upset, and stated that something had to be done with Kappmeier. Sackermann replied that they should forget it, to which Baykal retorted that she did not want to forget about it as Kappmeier should have filed the cards properly and that something must be done. He again instructed her to forget about it as it was "no big deal." To this last remark, Baykal said, "Well, what's the matter, what are you, sleeping with this girl; you know, like why are you sticking up for her this way, and Mr. Sackermann said, Yes, right, I am sleeping with her."<sup>11</sup> After that, he left the room. Vernice further testified that Baykal wanted to fire Kappmeier, and was persistent in this wish. She recalls Sackermann stating to Baykal that she would have to discuss this and that anyone she wanted to fire would have to be discussed with him.

Sackermann testified that on Monday, October 20, he received a telephone call about 8 a.m. from Kappmeier who stated that she had just received a nasty telephone call from Terry in reference to misfiling of cards. When

he arrived at work that morning, he questioned Baykal about this in the dispatch office. After he ascertained a few facts, he asked Baykal why did Terry call Kappmeier as the misfiling of the cards were not related to Kappmeier. Sackermann informed the employees, which included Ferraro, Lupo, and possibly O'Brien, that they should discontinue discussing the issue as he had a business to run. He does not recall any response from Baykal to this. He further testified that he did not remember uttering any comments to Baykal regarding her supervisory responsibilities on that date. However, on cross-examination Sackermann did concede that he announced in front of other employees that Baykal was on probation and further conceded that any discussion regarding the misfiling of cards by an employee was specifically delegated to her as a supervisor. He further denied ever telling Baykal that she was no longer a supervisor. However, he testified that he did state to her on October 20 that, because of the problems encountered, he wanted her to work very closely with him. He further acknowledged that sometime between October 20 and November 6 Baykal indicated that she wanted to discharge Kappmeier, which he overruled. He admitted informing Baykal that, with respect to firing employees, he wanted her to discuss the matter with him before anyone is discharged. He further testified that no employees were hired or discharged between October 20 and November 6. Sackermann further conceded that, in an affidavit recorded by a Board agent, he stated that Baykal continued to have authority to arrange for substitutes if an operator was absent and continued to have authority to allow people to leave early, but he does not know whether or not she exercised this authority from October 20 to November 6. Sackermann further testified that about Tuesday, October 28, he informed a representative of the Union named Cookson that Baykal was still his supervisor and part of management.

#### *F. Events of October 22*

Ferraro testified that on Wednesday, October 22, in the presence of Lupo, O'Brien, Baykal, Blaettler, and Ferraro, when Kappmeier reported to work, Ferraro asked her why she had passed a remark stating that Ferraro was returning on Tuesday (October 14) and that "here's where we get a hell of a lot more trouble." Kappmeier acknowledged stating it, adding that it was true and that she could say whatever she pleased. Baykal then suggested to Kappmeier that they should "try to straighten things out" and stated that she would like to discuss it. Kappmeier replied, "I don't have to take orders from you. I can do what I please." She ran out of the room in tears. Ferraro then observed Sackermann running down the steps from the second floor, placing his arm around her, and walking with her to the book-keeping department. He returned to the dispatch room, screaming, "I told you once before I want hands off Linda. I don't want her bothered. I don't want this brought up again. I want it completely forgotten." One of the employees responded that Kappmeier was a troublemaker, to which Sackermann retorted that he had not proof of that. Ferraro asked Sackermann, "Why don't

<sup>11</sup> Sackermann denied that this was a fact.

you ask her why she was let go wherever she worked before." Sackermann responded to that question by stating, "You should talk. You were fired and no matter where you work, you cause trouble. I spoke with your last boss on the phone. He told me how much trouble you caused." Ferraro acknowledged that she yelled at Sackermann that that was a lie, and he yelled back at her that she was lying. A screaming match ensued, after which Ferraro was pushed out of the room by some of the other employees.

On cross-examination, Ferraro testified that she does not recall using any foul or obscene language in her screaming match with Sackermann.

Baykal testified that on October 22 in the dispatch room, when Kappmeier came to work, Baykal, O'Brien, and Ferraro attempted to engage her in an argument. Baykal informed Kappmeier that she was upsetting her mother (Terry Paul), and if she did not stop, Baykal would "punch her in the mouth." Kappmeier then ascended the stairs where Sackermann met her, placed his arm around her, and escorted her to an office, after which Sackermann visited the dispatch room demanding to know who started the argument. When Baykal acknowledged that it was she who started the argument, he told her that she was not to speak to Kappmeier, that she was on probation, and he wanted the matter dropped.

Baykal told Sackermann that he did not control her brain and that, if she did not have any right as a supervisor, she had every right in the world as a person to ask Kappmeier questions. At this point of the discussion, according to Baykal, Ferraro interjected and stated that she wanted to know what Sackermann was waiting for when 10 people were already telling him who the troublemaker was, and if he would check with Kappmeier's previous jobs he would see that she was always fired for causing some kind of problem. His response was that Ferraro "was a fine one to talk as she had caused problems on other jobs and that he was talking to her ex-boss a couple of days ago and he said that she had caused problems." He then asked why she had left her last job. She replied that she left it 16 years ago to have a baby. Sackermann asserted that that was not true as she was a troublemaker and caused problems. Thereafter the "screaming session" began during which time Ferraro called Sackermann a "rotten liar." Baykal observed Ferraro's face was turning purple and began pushing her toward the door with the help of Lupo while Ferraro and Sackermann were screaming at each other. Although Baykal conceded that she used profanity toward Kappmeier that day, and testified that frequently profanity was used among the employees on a daily basis in the presence of Sackermann, none of the profanity was directed toward him. She further asserted that she did not hear Ferraro use any profanity toward Sackermann on October 22.

Lupo confirmed the essential parts of the argument between Ferraro and Sackermann. As to Baykal, she testified that she did not hear Ferraro utter any profane words.

Respondent contested the testimony of the General Counsel's witnesses with respect to the events of October 22.

Sackermann testified that on Wednesday, October 22, at approximately 4:30 p.m., at the change of shifts in the dispatch office, he was in his office upstairs and heard noises downstairs. He went downstairs to investigate the situation and heard "screaming and yelling." He then escorted Kappmeier out of the room and brought her to his office. Returning to the dispatch room he informed the employees, specifically Baykal, that he did not want any more outbreaks like this and "they should knock it off and forget everything and put the company back to order." Baykal responded that she could not do that as she cannot forget the past and must clear the air. Ferraro asked, "Can't I see who the troublemaker is?" He answered that he would find out for himself who was the troublemaker. Ferraro retorted that Sackermann could call Kappmeier's former employers and find out all about her. He replied that he was not interested in anybody's past and his only concern was that "people came to work and did a good job." He averred that he knows "everybody's past in this place" and that it was his job to know about people. He added that he knows about Ferraro's past, to which she turned and stated, "I am nothing but a f— liar and she kept this up and kept it up and kept it up." Ferraro was then dragged out of the building by Baykal and Lupo and while leaving she turned around and said to Sackermann, "I'm a son of a b—," Sackermann alleged that Ken Green was present during the latter part of his argument with Ferraro because Green spoke to him later and asked him why he was tolerating "this," to which Sackermann responded that he could not take nonsense like this and had to get it straightened out.

Ken Green testified that on October 22 at 4:30 p.m., he was in the bookkeeping office and heard a lot of commotion emanating from the dispatch room. Sackermann entered the bookkeeping office with Kappmeier who was hysterically crying. After Sackermann left, Green went outside the office to see what was happening. When he walked in the dispatch room, he observed Ferraro pointing a finger, walking toward Sackermann, stating, "You're a f— liar, you're a f— liar." He grabbed Sackermann by the arm, asking why he was listening to this. Sackermann responded that he had to have respect.<sup>12</sup> They both left the dispatch room.

#### *G. Events of October 24*

Ferraro testified that on Friday, October 24, in the latter part of the afternoon, Baykal asked Sackermann why the day-shift employees were still restricted from smoking, while the evening-shift employees could smoke. He asked Baykal where she had obtained her information. When she responded that she obtained the information from the employees themselves, he retorted that he really did not care, but still had to make up his mind whether or not the employees can smoke during the day. At this point, Ferraro asked Sackermann where he received his information regarding her last jobs, stating that she believed it was Kappmeier who had told him.

<sup>12</sup> At no time did Green testify that he heard Ferraro during the October 22 incident call Sackermann a "son of a b—."

Ferraro advised Sackermann that she had contacted a lawyer who had informed her that his remark constituted a defamation of character. He then called Ken Green to come to the dispatch room. After Green arrived, Sackermann asked if he heard Ferraro "cursing me the other day." Green nodded affirmatively. Sackermann then stated to Ferraro that she will "see when this goes to court who will win." Ferraro responded that she was contacting her lawyer again and also was "giving the Labor Board a call." On cross-examination, Ferraro specifically denied using any foul or obscene language to either Sackermann or Green.

Baykal testified that she believed the incident of October 24 occurred on October 23. She recalled Ferraro asking Sackermann who his source of information was regarding her previous job. When he did not answer, Ferraro demanded that she had a right to know, as what he had said to her the day before was defamation of character and that he should check with his lawyer. Sackermann ignored Ferraro and continued to walk away and proceed up the stairs. Ferraro yelled out to him that he should check with his lawyer and he answered, "yes, baby."

With respect to the October 24 incident, Lupo testified that later in the afternoon, as Sackermann passed by the dispatch room, Ferraro asked him for his source of information about her past jobs. He did not respond. Ferraro then stated that she knew it was Locantore who had told him.<sup>13</sup> When he did not acknowledge her remark, Ferraro told Sackermann that "it wasn't right of him to speak that way to her as she did nothing wrong." Sackermann then called Green and asked him if Ferraro was wrong, to which Green agreed. As Sackermann was walking out the door to go upstairs, Ferraro stated that she had called a lawyer and what he had said about her was defamation of character, to which Sackermann replied, "we'll see, baby." Lupo testified that she did not hear anything with respect to Ferraro going to any government agencies.

Sackermann testified that on October 24 he had a pre-arranged meeting with Green to discuss some technical problems. Green came over to Tra-Mar between 3 and 3:30 p.m. As he and Sackermann were on the way upstairs to Sackermann's office they passed by the dispatch room. Ferraro stated to Sackermann that he would be hearing from an attorney and that she was going to call the IRS, the FBI, and "who the heck else."<sup>14</sup> Green and he ignored her, and as they walked away he heard her calling out that they were "f— cowards."

Green testified that on October 24 at or about 4:30 p.m., he and Sackermann were walking by the dispatch room, on their way to Sackermann's office upstairs.

He then heard Ferraro yelling, "I am going to call my lawyer; I'm going to call the I.R.S.; I'm going to call the F.C.C." He then added the following, "I just continued upstairs and they said, you f— coward or something like

<sup>13</sup> Baykal also testified that Ferraro said she believed Locantore told him, whereas Ferraro testified she believed it was Kappmeier. It is insignificant whom she believed informed Sackermann, as it has no material bearing in this matter.

<sup>14</sup> Sackermann later testified that he believed Ferraro also threatened to go to the Labor Board.

that."<sup>15</sup> When they reached the second floor, Sackermann stated, "that's it; I can't take this any more. She has to go."

On cross-examination, Green denied that Sackermann had asked him to come over to witness a dispute, but did acknowledge that it is possible that Sackermann may have asked to see him at the end of the day on a matter unrelated to any dispute with Ferraro.

#### H. Events of October 27—Discharge of Lillian Ferraro

Ferraro testified that on Monday, October 27, Baykal entered the dispatch room with a letter in her hand, stating, "Lillian just got fired." She handed Ferraro the letter, put on her coat, and walked out of the building. Ferraro, Lupo, and O'Brien followed her. They went immediately to the NLRB Regional Office and filed the charge relating to Ferraro's discharge.

The letter received by Ferraro is as follows:

October 27, 1980

Lillian Ferraro  
4020 Gehr Place  
North Bergen, New Jersey 07047  
Dear Mrs. Ferraro:

Do to continuous insubordination and total lack of respect for management as evidence of your recent behavior be advised you are hereby terminated immediately from your present position with Tra-Mar Communications.

TRA-MAR COMMUNICATIONS, INC.

/s/ Charles E. Sackermann  
Charles E. Sackermann  
President

Baykal testified that after the OSHA visit in June, Sackermann confided in her that he felt that Ferraro was responsible for calling OSHA. He further stated, "How do you think I feel coming in here every day and having to have to walk past her?" Baykal further testified that, immediately prior to Ferraro's return to work in October, Sackermann asked her if it were necessary for Ferraro to return to work as everything seemed to be running smoothly. She answered that Lupo, O'Brien, and she had taken extra work upon themselves, and they were all anxious for Ferraro to return.

On October 27, Sackermann advised Baykal, in the presence of Ken Green, that he had decided to permit the employees to smoke, but only one at a time. He also handed her a letter signaling Ferraro's discharge and asked Baykal to deliver it. Baykal stated that she would not deliver the letter to Ferraro as he was discharging the wrong person. Nevertheless, she accepted the letter, strolled to the dispatch room, threw the letter on a desk, informed the daytime employees that they were allowed to smoke one at a time, that Ferraro was being terminated, and that she was leaving. The other employees, Ferraro, O'Brien, and Lupo followed her out of the build-

<sup>15</sup> On questioning from me, Green testified that it was Ferraro who made the statement.

ing, traveling directly to the NLRB Regional Office to file charges.

Terry Paul testified that after the OSHA visit Sackermann informed her one day in his office that he believed Ferraro had "turned him in to OSHA."

Lupo testified that in September, Sackermann informed her that he had problems with OSHA, which he attributed to the Union and Ferraro. She further testified that while Ferraro was on disability leave between September 2 and October 14, Sackermann asked Lupo if it were necessary for Ferraro to return to work inasmuch as they were doing so well. She responded affirmatively, stating that the pressure was on and she was looking forward to Ferraro's return to work. She further confirmed the testimony of Baykal and Ferraro with respect to the events of October 27.

Sackermann testified that after being abused by Ferraro on October 22 and 24, he considered his options over the weekend and decided to discharge Ferraro. He translated his decision into action by sending a telegram directed to Ferraro about midnight, Sunday, October 26. When he reported to work on Monday, October 27, he discovered that Western Union had not contacted Ferraro. He then handed Baykal a copy of Ferraro's discharge letter and instructed her to present it to Ferraro. Baykal demurred and walked out of the building. Within 5 minutes she returned, announcing that she would deliver the letter to Ferraro if Sackermann discharged Kappmeier also. He retorted, "One thing has nothing to do with the other." Baykal then left the office with the letter. Sackermann thereafter saw the employees walking out of the building. Sackermann emphasized that the immediate reason for firing Ferraro was because she had "cursed" him the previous Friday. Although he testified that no consideration was given to the fact that Ferraro insisted that he discharge Kappmeier, it is noted that, in Sackermann's affidavit to the Board agent, he indicates otherwise.

#### *1. Events of November 6—Termination of Dawn Baykal*

Sackermann testified that about November 4 or 5 Baykal and Lupo asked him if he were aware that cards were being sabotaged. He answered that he did not think the issue was worthwhile discussing, but stated that he would investigate the matter. Baykal asked if he had discussed the card problem with Kappmeier, accusing her of misplacing or deliberately misfiling cards.

Baykal testified that on November 6, in the presence of Lupo and Vernice, Sackermann told Baykal that he would overlook what happened the day before,<sup>16</sup> and they should get back to business and work smoothly. Baykal denied any wrongdoing. She argued that if permitted she could perform her job. He said, "Your job is just to answer the phones. You're just an operator. The only thing is that I didn't touch your salary yet." Both Lupo and Baykal argued that matters were not right. Baykal added that rules and regulations only applied to the daytime operators and herself. According to Baykal,

Vernice entered the argument at this point and began using profanity towards her, accusing her and other employees of being liars. Sackermann then instructed Vernice to tell Nancy to make up Baykal's check and that she was fired.

Lupo confirmed essentially Baykal's testimony. She specifically recalls that when Baykal asked Sackermann why he would not permit her to do her job, he answered, "Well, as far as I'm concerned, your [sic] just an operator. I haven't touched your salary yet." She further testified that Sackermann asked her (Lupo) if she were happy. When she responded negatively, he asked if she would like to be fired, to which she responded that she just did not want to work under "this pressure and circumstances." He then turned to Baykal and asked if she were not happy why "didn't she quit." Her response was, "Why don't you fire me." He then instructed Vernice to write out a check, and fired Baykal. Vernice left the room, came back with Baykal's check, threw it at her, and told her to "get the hell out of here."

Sackermann testified that on November 6 he asked Baykal to have a talk with him at the end of the day. When she replied that, if it were in reference to the cards she preferred to "get it over with right now," he asked her to bring in Lupo so there would be no misunderstanding and he asked Vernice to be present also. He explained to Baykal that he wanted her to discontinue her complaint about the misfiled cards. After a lively discussion, in which Baykal refused Sackermann's suggestion, he handed her a paycheck, stating that she was dismissed.

Vernice's version of the meeting on November 6 was as follows:

Sackermann, Baykal, Lupo, and she were in his office. He stated, "We got to stop this nonsense. Let's get back to work. Why can't we forget everything." Baykal responded that she could not forget it. Sackermann said that she should forget it, and Baykal replied that he was not going to tell her how to think, and that she could not do her job if he was going to tell her what to do. Baykal specifically stated, "I have to do it my way or I don't want to do it." Sackermann retorted that he was the boss, to which she replied that he should fire her if he did not like what she was doing. He stated that he did not want to fire her as that was not the problem, but he wanted this nonsense stopped, and if she did not she could quit. She repeatedly asked him to fire her if he would not let her handle the matters her way. Lupo asked why he kept "sticking up for" Kappmeier. Baykal stated that, "he must be sleeping with her; I know he is sleeping with her." Vernice became very upset and began to cry. Sackermann stated, "Look, it has to stop or forget it, you know, like—and she just again said, well, then fire me, fire me, because I'm not doing it your way; just fire me. Either fire her or fire me because I'm not putting up with this." Sackermann then called in Nancy and told her to give Baykal her check as it cannot go on like this.

<sup>16</sup> Apparently referring to the discussion involving Kappmeier and the misfiled cards.



### J. Analysis and Discussion

#### 1. Credibility of witnesses

At first blush, the instant case appears to be a classic case of the "Good Guys" versus the "Bad Guys," that is to say, all the witnesses appearing for one side were truthful and honest in everything to which they testified, whereas the witnesses produced by the other side lacked total credibility. All counsel for the three parties involved spent an inordinate amount of time in an effort to convince me that their witnesses were sincere, truthful, and forthright, while the witnesses for their adversary were exactly to the contrary. It is true that in cases such as this, where the law is very clear with respect to the evidence necessary to find 8(a)(3) and (1) violations, the trier of the facts must consider the totality of the evidence before he can make an appropriate finding of fact. I have concluded that, except in several specific special situations as discussed *infra*, there really is not that much diversity in the testimony of the witnesses relating to specific allegations of the complaint. True, there are differences in minor matters which may have a great bearing in a criminal case where a jury must make findings "beyond a reasonable doubt." However, in a civil matter such as we have here, where there is no jury, the administrative law judge, acting as jury, need only find violations if they are supported by "a preponderance of the evidence." In every trial where there is a difference of any degree of facts elicited by witnesses, one can never be absolutely and positively certain that the findings made are the true facts. Nevertheless, I found it of little value for counsel attempting to demonstrate that a witness must be "lying" or be "unworthy of belief" simply because the witness could not recall an exact hour that a certain event occurred. For example, much ado was made whether the incident of October 24 occurred at 3 p.m. or 4:30 p.m. Also much ado was made about whether on October 22 Sackermann had his arm around Kappmeier, was holding her hand, was holding her arm, or was holding her at all when he led her away following an argument in which she had been engaged with other employees in the dispatch room. Such differences are trivial in the big scheme of things, and thus I rejected them in my evaluation of the facts. Unlike the world of fiction and fairy tales, in the real world there are times when the "Good Guys" somehow are mistaken in their belief that a certain event occurred as they testified. By the same token, the "Bad Guys," who may be found completely untrustworthy for veracity in many situations, do manage somehow to tell the truth in some instances. Thus, where I may credit a witness as to a certain event, I may discredit him or her as to another event. I found that in this particular case it was not all "white" or "black." Much of it was "gray."

I shall now consider each allegation of the two complaints which the General Counsel has alleged to be a violation of the Act.

#### 2. The independent 8(a)(1) allegations

In totality, I find very little credibility problems to be resolved with respect to the independent 8(a)(1) allega-

tions. The General Counsel produced a myriad of witnesses, commencing with the original alleged discriminatorily discharged employees, Ferraro and Baykal, and adding support by various other employees of Respondent. Respondent's principal witness, Sackermann, did not specifically deny any of the alleged factual incidents as related by the General Counsel's witnesses. He lamely attempted to explain his reasons for the sayings and actions ascribed to him. Other of Respondent's witnesses, especially Nancy, also attempted to justify actions or statements made by them.<sup>17</sup>

The General Counsel contends that in May 1980, Sackermann threatened employees with reprisals if they selected the Union as their bargaining representative.

Lupo and Ferraro testified that after the petition was filed in May, Sackermann informed them that they should "think twice before making any moves because any privileges they now have are definitely going to be taken away if the Union is voted in." Although Sackermann admits meeting with the two employees, he denied saying that there would be any drastic changes if a union became the bargaining agent of his employees.

I credit both Lupo and Ferraro's version of this meeting. It should be noted that there was a sequestration of all the General Counsel's witnesses. Thus, each witness who testified was not present to hear any prior witnesses. Throughout the proceeding I was especially impressed by the clarity, sincerity, and forthrightness of Donna Lupo's testimony. In all events respecting the independent 8(a)(1) violations to which she testified, she appeared to have a very clear recollection of who said what. On the other hand, throughout the hearing I continually was compelled to remind Sackermann to answer questions put forth to him, not to engage in colloquy with cross-examiners, and not to offer opinions and conclusions. At numerous times during his long examination he was unsure of the facts or responded in an incomplete manner. Although no *specific* threats of reprisal were made, I do find that his statement, as testified to by Ferraro and Lupo, constitutes a violation of Section 8(a)(1) of the Act.

The General Counsel alleges that Sackermann threatened employees in May with more onerous and arduous working conditions and loss of privileges if they selected the Union as their bargaining representative.

I do not find any evidence to support this contention of the General Counsel, and, therefore, I recommend that this allegation be dismissed.

The General Counsel further alleges that in May both Sackermann and Baykal, at that time a supervisor as defined in Section 2(11) of the Act, promised employees wage increases if they rejected the Union as their bargaining representative.

Ferraro and Lupo credibly testified that in May, Sackermann expressed to them the possibility of raises for employees if the Union were "voted down." Thereafter Baykal advised employees that Sackermann was willing to accord them a 25-cent-per-hour increase immediately,

<sup>17</sup> For whatever reason, Respondent's attorney did not deem it necessary to argue in his brief with respect to the independent 8(a)(1) allegations.

and another such increase in January 1981 if the Union were not elected in the forthcoming election.

Respondent did not contest these statements by Ferraro and Lupo. The Board cases, supported by the courts, are legion in holding that any promises of wage increases made to employees prior to a Board-conducted election is not only objectionable conduct on the part of the employer, but is also an independent violation of Section 8(a)(1) of the Act. Accordingly, I find that Respondent in this instance has violated the Act as alleged.

The General Counsel also alleges that in May Sackermann threatened employees with discharge or layoff and the closing of his business if they selected the Union as their bargaining representative.

Lupo credibly testified that during one of the meetings with Ferraro and her in May, Sackermann stated that he would sell his business and move to Florida or computerize, which would have the effect of eliminating the operators' positions. Baykal testified that during the course of the campaign Sackermann told her that he "wasn't going to have any union come in and tell him how to run his company and that he would sell his company first or automate." Although the statement to Baykal was addressed to her as a supervisor and, thus, is not a violation, Baykal's testimony does support Lupo's testimony. Sackermann did not specifically deny making these statements and, in fact, admitted that he had spoken to employees both individually and as a group, telling them, "that they think of what they do that they don't hurt the Company to put us out of business."

I find the threats by Sackermann of either closing down the business, moving to Florida, or automating, should the Union be successful, constitute violations of Section 8(a)(1) of the Act. Furthermore, it may be inferred that as any of these actions would result in the discharge or layoff of employees, a further violation of Section 8(a)(1) is found, as alleged.

The General Counsel alleges that in May, Sackermann interrogated employees regarding their membership in the Union.

I find no evidence adduced during the hearing to support this allegation, and, thus, I recommend that it be dismissed.

The General Counsel also alleges that between April 27 and May 30, Sackermann threatened employees with denial of wage increases if they engage in activities on behalf of the Union.

To support this allegation, O'Brien testified that, sometime prior to the election, Sackermann called her into his office and told her, *inter alia*, that it had been all worked out in the budget to grant raises every few months to the employees, but "now it was frozen because of the Union and he couldn't give it." Respondent did not contest this allegation.

I find that the statement made by Sackermann to O'Brien, whom I credit, to be another independent violation of Section 8(a)(1) of the Act, as alleged.

The General Counsel further alleges that in July, Sackermann expressed to employees that selection of the Union as their bargaining representative would be futile.

To support his contention, the General Counsel apparently relies on a statement made in July by Sackermann,

as related by Ferraro following an election at Tra-Mar Electronics, another company owned by Sackermann, that Sackermann stated, "I told you I'll never have a union in here, I'll never have a union telling me how to run my business or giving me orders as to what to do, before I do that I'll sell the business and move to Florida."

It was stipulated that the election was held on May 30 and the Union was certified on June 13. Thus, any statements such as expressed by Sackermann in July would not have any effect on the voting of any employees. By this time, the Union was the authorized representative of the unit employees, was certified by the Board, and was prepared to negotiate with Respondent. The statement may have been a violation of another section of the Act, but I cannot conclude that it had any effect on influencing employees in their selection of a union representative. Accordingly, I recommend that this allegation be dismissed.

Lastly, with respect to the independent 8(a)(1) violations, the General Counsel alleges that, on various dates in September and November, Sackermann bypassed the representative of the employees and dealt directly with the employees regarding wages, hours, and working conditions.

O'Brien testified that in September she received a 50-cent-an-hour wage increase. The record further indicates that Blaettler was also granted a wage increase in November. Both increases were granted to employees represented by the Union without any bargaining being attempted with the Union on this matter.

Respondent did not dispute the alleged increase to O'Brien in September, and admits the increase accorded to Blaettler in November. Respondent attempted to justify the increase to Blaettler on the theory that new employees were being hired at a minimum wage and it was only fair to grant her an increase so that she would be paid at a higher wage than a new employee. He also explained that this was company policy which had been always done in the past.

Section 9(a) of the Act states that the majority representative of employees in the appropriate unit shall be the "exclusive representative" of employees in such unit for the purposes of collective bargaining. (See *Medo Photo Supply Corp. v. N.L.R.B.*, 321 U.S. 678 at 683-684 (1944).) It follows that Sackermann's discussion of a wage increase with O'Brien in September, after which the increase was accorded to her, and Respondent's granting of a wage increase to Blaettler in November, both being mandatory subjects of bargaining, are in violation of Section 8(a)(1) of the Act for, "[t]he Act not only protects the employees from the direct economic effect of the employer's unilateral action, but also forbids the bypassing of the collective bargaining agent, for this would undermine the union's authority by disregarding its status as the representative of the employees." *Leeds & Northrup Co. v. N.L.R.B.*, 391 F.2d 874, 877 (3d Cir. 1968). Further, the Supreme Court held in *N.L.R.B. v. Katz*, 369 U.S. 736 (1962), that unilateral changes in wages and working conditions, without prior consultation with the employees' bargaining representative,

"must of necessity obstruct bargaining, contrary to the congressional policy" and is a violation of Section 8(a)(1) of the Act, even "without also finding the employer guilty of over-all subjective bad faith." (369 U.S. at 747.) Accordingly, for the reasons enunciated in both *Katz* and *Medo Photo*, I find that Respondent violated Section 8(a)(1) of the Act by bypassing the Union, dealing directly with employees, and granting unilateral wage increases to employees.<sup>18</sup>

### 3. Withdrawal of privileges—written and oral work rules

The General Counsel alleges that in June and July, Respondent withdrew privileges and imposed more onerous and arduous terms and conditions of employment by announcing and implementing written and oral work rules.

The evidence is undisputed that on Monday, June 2, the first work date subsequent to the union election of Friday, May 30, Sackermann issued a set of written work rules prohibiting smoking, personal telephone calls, and the reception of visitors on company premises. Throughout the months of June and July, Sackermann verbally added new rules which affected the working conditions of the employees. These included prohibiting reading and eating at the switchboard, removal of bottled water and coffee, reducing the lunch hour, prohibiting the use of pay telephones, and prohibiting employees from operating the air conditioner.

Sackermann, without denying the institution of the various work rules, explained the reason for instituting these rules.

Ferraro and Lupo credibly testified that Sackermann, in instituting the written work rules, stated in the presence of the day-shift employees that the employees wanted a union and he had "decided to run the Company more efficiently" and that "this is what you've wanted and anybody breaking the rules would be fired."

There is no question that an employer has the right to establish work rules in his place of business. Respondent indicates that these rules were no different from previously issued work rules in 1976 and 1980, and thus no violation was committed. I find no merit in Respondent's defense.

It is clear, both from the threats previously made by Sackermann prior to the election and by the comments made on June 2 to the day-shift employees, that these work rules were propagated solely in retaliation for the employees' voting for the Union. Accordingly, I conclude that both the written and the later oral rules are proscribed by the Act, and thus Respondent is in violation of Section 8(a)(3) and (1) of the Act, as alleged.<sup>19</sup>

<sup>18</sup> It should be noted that this violation is also a violation of Sec. 8(a)(5) of the Act. However, for reasons unknown to me, the complaint does not contain any paragraph alleging a violation of Sec. 8(a)(5), and at no time did the General Counsel during the hearing attempt to amend the complaint to include an 8(a)(5) violation. The Union, which would benefit by an 8(a)(5) finding, did not participate at the hearing. Therefore, I shall not make any recommendation with respect to a violation of Sec. 8(a)(5) of the Act.

<sup>19</sup> Cf. *Westpoint Transport, Inc.*, 222 NLRB 345, 351 (1976). It would appear that many of the items which Respondent prohibited by its work rules are subjects which the Board has traditionally held to be mandatory

### 4. Warning letter to Lillian Ferraro on July 9, 1980

The General Counsel contends that the warning letter issued to Ferraro on July 9 constitutes a violation of Section 8(a)(3) of the Act.

The record establishes that Lillian Ferraro received a warning letter from Sackermann, via Baykal, on July 9. The facts surrounding the issuance of the letter are detailed, *supra*, in the factual portion of this Decision.

The record clearly established that Ferraro was the principal union adherent at Respondent's premises. From the testimony adduced from Ferraro, Baykal, Lupo, and other employees, it is perfectly clear that not only was Sackermann aware of her position, the record also is clear that Sackermann was hostile toward the Union and its adherents. The various acts committed by Sackermann, both prior to and subsequent to the election of May 30, convince me that Sackermann had no love for Ferraro, and it is obvious that he blames her for the success of the Union in his establishment. As a followup to the change in work rules, Sackermann lost no time in pinpointing Ferraro for further disciplinary action. Under other circumstances, one might infer that the warning letter issued to Ferraro on July 9 was legitimate. However, no evidence was forthcoming that any warning letters were issued to any of the other employees at any time. Of the items charged to Ferraro, I find that none of them were of such serious matter which required a written warning letter. In light of all the circumstances, including Sackermann's hostility toward both the Union and Ferraro, the issuance of the warning letter to Ferraro cannot be satisfactorily explained except as a retaliatory and discriminatory measure against her as the leading union adherent. Accordingly, I find that Respondent, by issuing the warning letter to Ferraro, is in violation of Section 8(a)(3) and (1) of the Act.<sup>20</sup>

### 5. Discharge of Lillian Ferraro on October 27

The complaint alleges that Respondent discharged Ferraro on October 27, and has failed and refused to reinstate her, because of her union and protected concerted activities.

The General Counsel makes a *prima facie* case with respect to the allegations. All the elements of a discriminatory discharge are present. There was union activity of Ferraro; there was animus expressed by Respondent; and there were two prior incidents involving discriminatory action by Respondent against Ferraro, as analyzed *supra*. I reject Respondent's argument that the discharge occurred too far in time in relation to Ferraro's union activities. I considered that on July 9 she received a warning letter, she was absent on sick leave from September 2 to October 13, and, less than 2 weeks following her return to work, she was discharged. I credited the testimony of Baykal and Lupo that Sackermann had asked them during Ferraro's absence if she were needed. It is

subjects for bargaining and would be violations of Sec. 8(a)(5) of the Act. However, as there is no 8(a)(5) allegation before me, I shall make no finding with respect to it.

<sup>20</sup> Cf. *Westpoint Transport, Inc.*, *supra* at 352.

obvious that Ferraro troubled him and he did not want her to return, if possible.

However, in examining the circumstances surrounding Ferraro's discharge, I conclude that her argument with Sackermann concerning Linda Kappmeier was not work related. Ferraro was neither a supervisor nor a shop steward entitled to discuss such business matters with Sackermann. I further conclude that the record, through testimony of various witnesses, establishes that Sackermann exhibited favoritism toward Kappmeier. However the basis for this favoritism cannot be determined. The General Counsel has alluded throughout that Sackermann was antiunion and discriminated against prounion employees. However, he ignores the fact that, in the election of May 30, the vote was nine votes for and no votes against the Union. The record further indicates that Kappmeier was one of the eligible voters in the election. Therefore, there is no evidence that she was antiunion; if anything, she voted for the Union.<sup>21</sup>

During the argument of October 22, all of Respondent's witnesses, including Sackermann, his daughter Vernice, and Green, testified that Ferraro used profanity directed toward Sackermann. On the other hand, Ferraro testified that she was so angry that she does not know whether or not she used profanity. Lupo and Baykal testified that they did not hear Ferraro use any profanity. In this particular instance, I credit Respondent's witnesses. They graphically portrayed the argument of Sackermann and Ferraro. I do not discredit the testimony of Baykal and Lupo as being untruthful. They claimed that neither one heard Ferraro use profane language. In all the excitement of "screaming and yelling" that allegedly occurred during that particular time, perhaps neither one did hear the profanity which was not directed to either one of them. Perhaps both were so used to hearing profanity throughout their years working at Respondent's establishment that it did not have any effect on them. With all the record evidence of various individuals using profane language at various occasions, I accept the fact the Ferraro, in such a rage that she does not remember what she said, used the vocabulary ascribed to her by Sackermann, Vernice, and Green. The conversation with respect to Ferraro's former job continued into Friday, October 24. Again, according to Respondent's witnesses, Ferraro directed profanity toward Sackermann. It was only after these two outbursts by Ferraro that Sackermann decided over that weekend to discharge her, which occurred the following business day on Monday, October 27.

The issue thus presented is whether or not the discharge of Ferraro resulted from her foul language or was merely a pretext utilized by Sackermann to rid himself of a leading union adherent.

Throughout the years the Board has issued numerous decisions with respect to the discharge of employees who use profane, obscene, or otherwise foul language directed to employers or in their presence. Each decision

appears to rest on the facts of each case. One of the Board's most recent decisions, *Fibracan Corp.*, 259 NLRB 161, was issued on November 4, 1981, in which this Administrative Law Judge appeared as one of the counsel for the General Counsel 2 years earlier. Although at that time I strongly believed that the General Counsel had a meritorious case relating to a similar incident in which an alleged discriminatorily discharged employee used profanity towards the manager of the plant, a panel majority consisting of Members Fanning and Zimmerman found no violation. In his dissent, Member Jenkins cited Board cases to the contrary. I have read these cases very carefully. In most instances, these cases held that profanity used by a shop steward or other union representative, in the context of a bargaining session or grievance procedure, was permissible as it occurred in the heat of battle; namely, in a *res gestae* situation. These cases were distinguished by the majority panel in *Fibracan*. It held that, "In none of those cases did the Board find, as we do here, the misconduct sufficiently egregious to deny an employee the protection of the Act." (Fn. 4, p. 3.) I have further considered the criteria set forth in the *Wright Line* case.<sup>22</sup> I am convinced that, although Sackermann may have been looking for a reason to discharge Ferraro, but for her profanity<sup>23</sup> she would still be employed, this despite the fact that, as the General Counsel contends, Sackermann stated in his affidavit that in discharging Ferraro he also took into account her "continued manner of behavior of getting involved in his business with things that did not concern her." Although her union and concerted activity is not specifically mentioned, one can logically conclude that Sackermann was referring to these activities in making this statement.

It can also be argued that Ferraro was provoked by Sackermann which caused her outburst of profanity. I do conclude that she was provoked by Sackermann's statements regarding her former employment (a matter in which I credit Ferraro's version leading to the argument of October 22), but this provocation is not the type which justified her violent outburst and foul language.

The General Counsel further may argue that profanity was used at all times throughout the establishment of Respondent without anyone being rebuked or disciplined for it. I have concluded that the use of profanity was a common practice in Respondent's facility. However, general profanity is not the issue herein. The issue is the profanity directed at the chief executive of Respondent. The fact that Sackermann himself, or any other supervisory or managerial personnel, may have used profanity in various conversations with employees, does not sanction an employee's use of foul language directed toward Sackermann.

The General Counsel also argues that a disparity of treatment was accorded to Ferraro inasmuch as no disci-

<sup>21</sup> Whether or not Sackermann "slept" with Kappmeier is not relevant. He denies it, his daughter refused to believe it, and no evidence was uncovered, except for rumors that such were the case. It is unimportant, irrelevant, and unnecessary for me to make a finding with respect to this contention.

<sup>22</sup> *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981).

<sup>23</sup> Assuming, *arguendo*, that Ferraro did not use profanity, her calling Sackermann a "liar" and "coward" in the presence of other employees would be sufficiently egregious, as an act of insubordination, to warrant disciplinary action, *viz.*, discharge, against her.

plinary action was taken against Baykal when she used profanity in the presence of Sackermann directed against one of his daughters. It is noted that Sackermann did not accept the language, and did rebuke Baykal, suggesting more respect be accorded his daughter. The fact that Baykal "threatened" to "punch in the mouth" a daughter of Sackermann is perceived by me not as a threat of physical harm but as a slang expression used by certain individuals to express their annoyance at something. The statement was made in private to Sackermann and, therefore, caused him no embarrassment with employees and was not uttered as a sign of disrespect for him. I distinguish Baykal's remarks to Sackermann from Ferraro's remarks, as the latter were made in a shouting voice in the presence of other employees not only on October 22 but again 2 days later on October 24.

Accordingly, based on the *Fibracan* decision of the Board, I am compelled to find that the discharge of Lillian Ferraro, on balance, resulted directly and causally for her argument with Sackermann on October 22 and 24, an unprotected activity, and thus I recommend that this allegation of the complaint be dismissed.

#### 6. Discharge of Dawn Baykal

The General Counsel contends that Respondent discharged Baykal on November 6 and has failed to reinstate her because she concertedly protested terms and conditions of employment and because its employees engaged in union and concerted activities.

Respondent, on the other hand, contends and argues that Baykal was a supervisor as defined in Section 2(11) of the Act and, therefore, is not entitled to the protection of the Act. Accordingly, Respondent, in its discharge of Baykal, violated no provision of the Act.

The facts, as detailed *supra*, establish very clearly that on October 20, Sackermann informed Baykal that she was on probation and that she must clear with him all actions taken by her for 1 month. From that point to her discharge on November 6, Baykal became involved with the many specific incidents that occurred, including the arguments involving Kappmeier and Ferraro, the termination of Ferraro, and the walkout of employees to protest Ferraro's termination. During this period of time, Baykal aggressively attempted to have Kappmeier discharged on the basis that she was the cause of various problems in the plant, and aggressively argued with Sackermann that she should not have discharged Ferraro. These protests culminated in her meeting with Sackermann on November 6 in his office in which she protested, *inter alia*, the issuance and enforcement of the work rules found to be in violation of the Act. During the argument with Sackermann, Baykal testified that she could not work under the conditions set up by him. His response was that she had to work under the terms and conditions of employment as laid out by him. When Baykal continued to insist that she was unable to do so, Sackermann terminated her services.

The first item to be determined is whether or not Baykal acted in her capacity as a supervisor or in the capacity of a rank-and-file employee in the discussion with Sackermann on November 6 leading to her termination.

Under the definition of supervisor in Section 2(11) of the Act, various criteria are listed. It has long been decided that a person need possess only one criterion to be considered a supervisor within the meaning of the Act. The factors which Respondent relies upon are the following:

1. Baykal's salary of \$220 a week continued until her termination, whereas full-time senior mobile operators receive \$3.75 per hour, equivalent to approximately \$150 for a 40-hour week.

2. Baykal did not have to punch a timecard, as required by other rank-and-file employees.

3. Baykal continued to total and adjust employees' timecards, including initialing the timecard of employee Blaettler on October 29 when she forgot to punch out.

4. Baykal adjusted timecards of all employees for the 18 minutes they were underpaid when they walked out in the dispute over Ferraro's termination.

5. On October 28, Baykal telephoned Blaettler at her home, requesting that she come to work to substitute for a sick employee.

6. Sackermann, in telephoning Blaettler on October 31 to report to work, directed her to consider his request and let Baykal know. When she did inform Baykal, Baykal approved the half-day work schedule for Blaettler.

7. During a hearing before the Unemployment Appeals Tribunal of the State of New Jersey on December 12, Baykal testified under oath that she was not aware she was a rank-and-file operator until informed by Sackermann on November 6.

The factors that the General Counsel relies upon to evidence that Baykal was not a supervisor on November 6 are as follows:

1. Sackermann placed her on probation for 1 month on November 20, stating that she could not fire anyone without permission for that month.

2. Sackermann refused to permit Baykal to speak to Kappmeier about the work problems that "Kappmeier was creating."

3. He refused to follow Baykal's recommendation to discharge Kappmeier or her recommendation not to discharge Ferraro.

4. Immediately prior to her discharge on November 6, Sackermann reminded her that she was just an operator whose job was just to answer the telephones.

Other factors not argued by the General Counsel but adduced at the hearing are the following:

1. Kappmeier told Baykal after October 20 that she did not have to listen to her.

2. Sackermann checked Baykal's work schedules which was never done before.

3. Baykal discontinued hiring, firing, and making work assignments.

4. Baykal earned overtime pay when such work was available.

Although there is a dispute involving credibility as to Baykal's various functions between October 20 and November 6, I credit the General Counsel's witnesses where there is a conflict. The basic duty that Baykal possessed as an admitted supervisor in Respondent's estab-

lishment was to make work assignments. I credit Baykal and other General Counsel witnesses who testified that during the time frame material herein, Baykal worked as an operator on the board and made no assignments on her own to other employees. It is true that she did care for the timecards as had been done by her previously. I find this to be a ministerial function which could be performed by anybody. Many employees care for timecards who are office clerical employees, plant clerical employees, or have other titles. This function does not make one a supervisor. I further considered Respondent's argument that Baykal had contacted Blaettler to report to work. However, she did not succeed in the assignment, informed Sackermann, and he personally telephoned Blaettler to report to work. The fact that he advised her to check with Baykal if she was prepared to work and Baykal later approved her half-day workday is insignificant. I also considered Baykal's testimony at the unemployment office. It is clear that at the time of her testimony in December, Baykal stated that she did not believe that she was not a supervisor until Sackermann told her so on November 6. The fact that an employee considers herself a supervisor does not make her one. It is the functions that she performs that are critical.

The Board has held that the duties of the employee held at the time of the discharge control the question of the employee's supervisory status.<sup>24</sup> The Board has further held that the fact that a supervisor continues to receive a weekly salary rather than a wage is not indicative of supervisory status.<sup>25</sup>

After careful consideration of all the evidence, I find that on November 6, Baykal was not a supervisor, but a rank-and-file employee.

Having found Baykal to be an employee protected by Section 7 of the Act, I find that her discharge of November 6 was a direct result of her various protests with respect to working conditions of the employees for a period of time up to and including November 6. Accordingly, I find that Respondent, by discharging Baykal for protesting said matters, violated Section 8(a)(1) of the Act.

Assuming, *arguendo*, that I have misinterpreted the Board's position with respect to Baykal's supervisory status as of November 6, and the Board, in its collective wisdom, concludes that Baykal is a supervisor as defined in the Act, I would still find that the discharge of Baykal is a violation of Section 8(a)(1) of the Act.

The discharge of a supervisor for engaging in either union or protected concerted activities is normally not an unfair labor practice. As pointed out *supra*, a supervisor is not an employee within the meaning of Section 2(3) of the Act, and therefore not entitled to statutory protection to which other employees are entitled. However, the Board has held that where a supervisor's discharge interferes with the rights of employees under Section 7 of the Act, e.g., where it constitutes an integral part of an employer's pattern of conduct aimed at penal-

izing its employees for their union activities, this conduct is violative of Section 8(a)(1) of the Act.<sup>26</sup>

The facts of the instant case establish that from the time of the filing of the petition by the Union in this matter, Respondent, through Sackermann, committed various acts of misconduct in violation of Section 8(a)(1) and (3) of the Act. One of the matters protested by Baykal on November 6 included the urging of Sackermann to rescind the work-rule regulations promulgated by him in June and July, acts which I have found to be violations of the Act. In recent years, the Board has experienced great difficulty in arriving at a unanimous decision as to what constitutes a violation when a supervisor is discharged. In a fragmented decision in *Fresno Townehouse*, a 1979 decision, it is stated that the Board has "authority to grant reinstatement to supervisors found to have been discharged for refusing to engage in unfair labor practices, for testifying at a Board proceeding, for providing an affidavit to a Board agent, or for attempting otherwise to protect employees from interference or discrimination proscribed by the Act."<sup>27</sup>

In the same case, the Board majority stated:

Thus, the Board has continued to order supervisors reinstated to their supervisory positions where it has been established that the supervisors were discharged in order to interfere indirectly with employee rights by limiting access to the Board's process, by coercing supervisors into violating the Act, by masking or otherwise facilitating direct discrimination against employees, or by tending to cause employees reasonably to fear like action will be taken against them if they participate in protected activity.<sup>28</sup>

In a later case decided by a Board panel in 1980, in which a vigorous dissent was filed by Member Truesdale, the majority panel stated as follows:

The Board has never held that supervisory participation in concerted or union activity is protected. Rather, reinstatement of supervisors in these cases has been ordered only when, and precisely because, the respondent's action is found to have been motivated, not by the supervisor's own activity, but by a desire to stifle employees' exercise of Section 7 rights and is part of an overall scheme designed to achieve successfully that result. In some cases, that the action taken against a supervisor was so motivated may be readily apparent, while in others motivation may not be so easily discerned. The fact remains, however, that vindication of employees Section 7 rights, not protection of supervisors engaging in union or concerted activity, is the basis for the finding that a respondent has violated Section

<sup>24</sup> *Unimasco, Inc.*, 196 NLRB 400 (1972).

<sup>25</sup> *Coast Delivery Service, Inc.*, 172 NLRB 2268, 2273-74 (1965), *aff'd*, 437 F.2d 264 (9th Cir. 1971); *Adam & Eve Cosmetics, Inc.*, 218 NLRB 1317 (1975).

<sup>26</sup> *Production Stamping, Inc.*, 239 NLRB 1183, 1193, citing cases at fn. 13 (1979).

<sup>27</sup> *Nevis Industries, Inc., d/b/a Fresno Townehouse*, 246 NLRB 1053, 1054 (1979), with earlier cases cited.

<sup>28</sup> *Ibid.* with cases cited.

8(a)(1) and that the circumstances require reinstatement of the discharged supervisor.<sup>29</sup>

In the instant case, I find that Respondent, through its various acts in violation of Section 8(a)(1) and (3) of the Act, was attempting to discourage its employees in their rights protected under Section 7 of the Act. In the presence of employee Lupo, Baykal protested to Sackermann, *inter alia*, the work rules instituted by him unilaterally with the object of discouraging union activity. I conclude that the discharge of Baykal on November 6 was a signal to other employees that a continuation of their protest would result in further disciplinary action.

Accordingly, whether Baykal is found to be a supervisor or not is irrelevant in this case. Her discharge constituted a violation by Respondent under Section 8(a)(1) of the Act.

#### IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent as set forth in section III, above, occurring in connection with the operations of Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

#### V. THE REMEDY

Having found that Respondent engaged in unfair labor practices, it will be recommended that it cease and desist therefrom, and that it take affirmative action necessary to effectuate the policies of the Act.

It will be recommended that Respondent offer Dawn Baykal immediate and unconditional reinstatement to her former position, without prejudice to her seniority or other rights and privileges, and that Respondent make Baykal whole for any loss of earnings she may have suffered as a result of the discrimination against her, by

paying her the sum of money equal to that which she normally would have earned as wages from November 6, 1980, to the date of Respondent's offer of reinstatement, less her net earnings during such period, with backpay and interest thereon computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977). See also *Isis Plumbing & Heating Co.*, 139 NLRB 716 (1962).

#### CONCLUSIONS OF LAW

1. Respondent Tra-Mar Communications, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 827, International Brotherhood of Electrical Workers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening employees with discharge, layoffs, more onerous working conditions, loss of privileges, a denial of promised wage increases, and with a plant shut-down; by promising wage increases; and by bypassing Local 827, International Brotherhood of Electrical Workers, AFL-CIO, and dealing directly with its employees, Respondent Tra-Mar Communications, Inc., violated Section 8(a)(1) of the Act.

4. By discharging Dawn Baykal, its employee, because of her protected concerted activity on behalf of employees of Respondent, Respondent discriminated against her in violation of Section 8(a)(1) of the Act.

5. By withdrawing privileges of employees and issuing written and verbal work rules because its employees engaged in activities on behalf of Local 827, International Brotherhood of Electrical Workers, AFL-CIO, Respondent violated Section 8(a)(3) and (1) of the Act.

6. By issuing a warning letter on July 9, 1980, to Lillian Ferraro because of her union and concerted protected activities, Respondent discriminated against said employee, Lillian Ferraro, in violation of Section 8(a)(3) and (1) of the Act.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]

<sup>29</sup> *DRW Corporation d/b/a Brothers Three Cabinets*, 248 NLRB 828, 829 (1980).